Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1001 OF 2011
NALLINI PATHMANATHAN J
7 NOVEMBER 2012

Tort — Conspiracy — Tort of conspiracy to cause economic damage — Whether defendant deliberately breached contract to injure plaintiffs' economic interests — Whether commission of breach to protect own economic interests sufficient to satisfy 'intention' ingredient required for tort of conspiracy to injure — Whether plaintiffs by conduct waived breach — Whether co-conspirator must be party to action for claim based on conspiracy to injure to succeed

The plaintiffs ('Deepak' and 'Ezul') were shareholders and directors of the second defendant ('Prestige Scale') which entered into a sale and purchase agreement ('SPA') to buy a building owned and under construction by Glomac. Prestige Scale sought financing for the purchase from Kuwait Finance House (M) Sdn Bhd ('KFH') which agreed to provide the funds on condition it had equity participation in the acquisition of the building. Later, as Deepak and Ezul wanted to sell their shares in Prestige Scale and KFH wanted to buy the building for itself, KFH incorporated the first defendant ('Intrared') to buy the plaintiff's shares in Prestige Scale. Intrared signed a share sale and purchase agreement ('SSPA') with the plaintiffs making it the owner both of the plaintiffs' shares and of Prestige Scale although the balance of the purchase price for the shares ('the balance purchase price') had yet to be paid to the plaintiffs. By a deed of assignment, to which Intrared consented, the plaintiffs assigned all their rights to the balance purchase price to Bank Rakyat in consideration for a loan which equalled the balance purchase price. Intrared undertook to pay the balance purchase price to Bank Rakyat in stages as stated under the SSPA while KFH issued an Irrevocable Letter of Undertaking to unconditionally and irrevocably pay the plaintiffs or Bank Rakyat the balance purchase price without having to get Intrared's prior consent. Intrared subsequently informed the plaintiffs that because it had discovered a 'cl 47' in the Development Order ('DO') permitting only Glomac and its subsidiaries to occupy the office space in the building, it would stop payments in respect of the balance purchase price to Bank Rakyat until the issue of cl 47 was resolved. Intrared claimed cl 47 destroyed the substratum of the SSPA as the purpose of its share purchase in Prestige Scale was to allow it, and KFH, to eventually acquire office space in the building. KFH toed Intrared's line and similarly refused to honour its obligation to pay under the Irrevocable Letter of

Undertaking. As the combined actions of Intrared and KFH threatened to cause the plaintiffs to default in their loan agreement with Bank Rakyat, the plaintiffs urged the two parties to fulfill their obligations pointing out that the SSPA was a separate matter from the SPA. Deepak even volunteered to assist in resolving the issue of cl 47 by organising a meeting between all parties concerned. Intrared and KFH nevertheless suspended payments towards the balance purchase price and matters returned to normalcy only after Kuala Lumpur City Hall deleted cl 47 from the DO. By that time, since Bank Rakyat had failed to receive the scheduled payments from Intrared or KFH, it held the plaintiffs to be in default setting off a chain of events which included the bank recalling the loan and demanding repayment, the plaintiffs being blacklisted in Bank Negara's defaulters' list resulting in their being unable to obtain financing from other institutions, damage to the plaintiffs' reputation and goodwill and causing them to lose investment opportunities in other transactions and making them liable to pay Bank Rakyat late penalty charges and interest totalling RM1,011,497.41. The plaintiffs claimed that Intrared and KFH had by their deliberate breaches of their respective obligations conspired to injure the plaintiffs economically. The plaintiffs claimed Prestige Scale should be made equally liable for the losses they had suffered because it was the alter ego of Intrared. Intrared denied it had conspired to injure the plaintiffs and said such a claim was in any case unmaintainable as KFH was no longer a party to the action, the claim against it having been discontinued following a settlement agreement. Intrared said it had no option but to cease making payments under the SSPA for its own protection because if it had terminated the agreement the plaintiffs would not have been able to repay the substantial sums that had already been paid thereunder. Intrared also contended that even if it was guilty of committing a breach, Deepak had, by his involvement in trying to resolve the issue of cl 47, waived the breach.

Held, allowing the plaintiffs' claim only against Intrared in part with costs:

(1) Intrared's act of suspending payment indefinitely was wrong and breached the SSPA. The gravity of the breach was borne out by the fact it was aware the payment of the balance purchase price went towards meeting the plaintiffs' repayment obligations to Bank Rakyat (see para 72).

(2) Prior to the entry into the SSPA, Intrared's solicitors had undertaken a due diligence exercise which made express reference to the Development Order. As its solicitors had full knowledge of the subsistence of the DO, Intrared was presumed to have had knowledge not only of the subsistence of the DO but also of its contents. Its stance that it only became aware of the existence of cl 47 in the DO much later was untenable and less than credible (see paras 70 & 72).

(3) The fact the plaintiffs sought to assist Intrared in respect of Prestige

Scale's contract with Glomac over cl 47 in no way impinged upon, abrogated, negated or waived Intrared's obligation to pay the plaintiffs under the SSPA (see para 84).

(4) The fact that both Intrared and KFH determined at the same time not to honour their separate obligations under two different contracts evidenced concerted action or an agreement or combination of action by them against the economic interests of the plaintiffs. Both entities were fully aware of the consequences of their action on the plaintiffs' loan repayment obligations to Bank Rakyat (see paras 108 & 137).

(5) The evidence showed Intrared appeared to hold a grudge and fault Deepak for the subsistence of cl 47 and for allegedly failing to highlight it to them. The existence of such a 'grudge' was inferable from Intrared's conduct in breaching its obligations when in fact such breach could not in law alleviate the problem caused by cl 47. The decision to cease payments was only capable of one construction, namely, to cause injury to the plaintiffs by causing them to default on the loan to Bank Rakyat (see para 144).

(6) Intrared's contention that it could not terminate either the SSPA or the SPA was untenable. The recourse of terminating the agreement with the plaintiffs was available to it and it was no excuse to contend the plaintiffs were 'unlikely to be able to repay the monies'. That would have been the correct legal position to adopt rather than effecting a breach of the SSPA which provided no remedy in relation to the SPA between Prestige Scale and Glomac. The only inference that could be drawn was that Intrared and KFH intended to injure the plaintiffs' economic interests. Even if it was accepted that Intrared deliberately ceased to honour its contractual obligations to protect or promote its own economic interests, that was sufficient to satisfy the mental ingredient or 'intention' required for the tort of conspiracy to injure (see paras 149, 151 & 153).

(7) The absence of KFH as a party to the action did not prohibit the plaintiffs from pursuing with or succeeding on the tort of conspiracy to injure. There was no evidence the plaintiffs had voluntarily released KFH in relation to the cause of action in conspiracy (see para 170).

(8) The veil of incorporation of Prestige Scale ought not to be lifted as it was not liable to the plaintiffs per se for the breach of contract and conspiracy to injure. Neither was Prestige Scale used as a device or façade to conceal Intrared's liability in relation to its wrongdoing (see paras 191 & 190 (v)).

(9) The plaintiffs had succeeded in establishing they had suffered the imposition of late payment charges and interest amounting to RM1,011,497.41 levied by Bank Rakyat. It was the natural and readily forseeable consequence of the failure to pay the loan instalments due

under the facility at the requisite time. The cause for the levy of the said sum was the breach of contract by Intrared (see para 210).

(10) By reason of the conspiracy to injure on the part of Intrared and KFH, the plaintiffs lost their credit rating as a result of being placed on a defaulters' list and they were entitled to compensation for such loss. Their companies also suffered financial losses as a result of the lack of further financing. Given this composite evidence, a sum of RM1m was reasonable compensation for the loss so suffered. The said sum was due to the plaintiffs whether the damages arose from the breach of contract cause of action or from the conspiracy to injure (see paras 242, 247 & 248).

[Bahasa Malaysia summary

Plaintif-plaintif ('Deepak' dan 'Ezul') merupakan pemegang-pemegang saham dan pengarah-pengarah defendan kedua ('Prestige Scale') yang telah memeterai perjanjian jual beli ('SPA') untuk membeli sebuah bangunan yang dimiliki dan berada di bawah pembinaan Glomac. Prestige Scale memohon pembiayaan bagi pembelian daripada Kuwait Finance House (M) Sdn Bhd ('KFH') yang telah bersetuju untuk memperuntukkan dana dengan syarat ia mempunyai penyertaan ekuiti dalam pengambilalihan bangunan tersebut. Kemudian, oleh kerana Deepak dan Ezul bercadang untuk menjual saham-saham mereka di Prestige Scale dan KFH bercadang untuk membeli bangunan tersebut untuknya sendiri, KFH memperbadankan defendan pertama ('Intrared') untuk membeli saham-saham plaintif dalam Prestige Scale. Intrared menandatangani penjualan saham dan perjanjian jual beli ('SSPA') dengan plaintif-plaintif menjadikannya pemilik saham-saham plaintif-plaintif dan Prestige Scale walaupun baki harga belian untuk saham ('harga belian') belum dibayar kepada plaintif-plaintif. Melalui suatu surat ikatan penyerahhakkan, dengan kebenaran Intrared, plaintif-plaintif menyerahkan kesemua hak-hak mereka ke atas baki harga belian kepada Bank Rakyat dengan balasan pinjaman yang sama dengan baki harga belian. Intrared mengakujanji untuk membayar baki harga belian kepada Bank Rakyat secara beransur-ansur seperti yang dinyatakan di bawah SSPA manakala KFH mengeluarkan surat akujanji yang tidak boleh ditarik balik untuk membayar plaintif atau Bank Rakyat tanpa syarat bagi harga belian tanpa perlu mendapatkan persetujuan Intrared. Intrared kemudiannya memaklumkan plaintif bahawa memandangkan ia telah menemui 'klausa 47' dalam Perintah Pembangunan ('PP') yang membenarkan Glomac dan anak-anak syarikatnya sahaja untuk menduduki ruang pejabat di dalam bangunan, ia akan menghentikan pembayaran baki harga belian Bank Rakyat sehinggalah isu klausa 47 telah diselesaikan. Intrared menghujahkan bahawa klausa 47 melupuskan substratum SSPA kerana tujuan pembelian saham dalam Prestige Scale adalah untuk membolehkan ia dan KFH, untuk memperoleh ruang pejabat di dalam bangunan. KFH bersetuju dengan Intrared dan turut enggan

untuk menjalankan kewajipannya membayar di bawah surat akujanji yang tidak boleh ditarik balik. Oleh kerana gabungan tindakan-tindakan Intrared dan KFH mengancam untuk menyebabkan plaintif-plaintif gagal dalam perjanjian pinjaman mereka dengan Bank Rakyat, plaintif-plaintif menggesa kedua-dua pihak untuk memenuhi obligasi mereka dan menghujahkan bahawa SSPA adalah satu perkara yang berasingan daripada SPA. Malahan, Deepak menawarkan diri untuk membantu dalam menyelesaikan isu klausa 47 dengan menganjurkan mesyuarat antara pihak-pihak yang berkenaan. Namun begitu, Intrared dan KFH menghentikan pembayaran bagi baki harga belian dan perkara-perkara kembali seperti sediakala hanya selepas Dewan Bandaraya Kuala Lumpur mengeluarkan klausa 47 daripada PP. Pada masa itu, oleh kerana Bank Rakyat gagal untuk menerima bayaran yang dijadualkan dari Intrared atau KFH, ia memutuskan bahawa plaintif-plaintif gagal hingga mencetuskan rantaian peristiwa yang termasuk bank menarik balik pinjaman dan menuntut pembayaran balik; plaintif disenaraihitamkan dalam senarai pemungkir Bank Negara menyebabkan mereka tidak dapat untuk mendapatkan pembiayaan daripada institusi-institusi lain; menjatuhkan reputasi dan nama baik plaintif-plaintif; dan menyebabkan mereka kehilangan peluang pelaburan dalam transaksi-transaksi lain dan menjadikan mereka bertanggungan untuk caj penalti lewat dan faedah kepada Bank Rakyat berjumlah RM1,011,497.41. Plaintif mendakwa bahawa Intrared dan KFH telah, melalui pelanggaran sengaja ke atas kewajipan masing-masing berkomplot untuk menjejaskan ekonomi plaintif-plaintif. Plaintif-plaintif mendakwa bahawa Prestige Scale perlu sama bertanggungan ke atas kerugian yang telah mereka alami kerana ia adalah *alter ego* Intrared. Intrared menafikan ia berkomplot untuk menjejaskan plaintif-plaintif dan menghujahkan bahawa tuntutan sedemikian tidak boleh diteruskan dalam apa jua keadaan kerana KFH bukan lagi pihak dalam tindakan tersebut, tuntutan terhadap ia telah dihentikan berikutan suatu perjanjian penyelesaian. Intrared menghujahkan bahawa ia tidak mempunyai pilihan tetapi untuk berhenti membuat bayaran di bawah SSPA untuk perlindungannya sendiri kerana jika ia menamatkan perjanjian tersebut, plaintif tidak akan mampu untuk membayar balik jumlah wang yang besar yang telah pun dibayar. Intrared juga menegaskan bahawa walaupun ia bersalah melakukan suatu kemungkiran, Deepak, dengan penglibatannya dalam usaha untuk menyelesaikan isu klausa 47, telah mengetepikan pelanggaran tersebut.

Diputuskan, membenarkan sebahagian tuntutan plaintif hanya terhadap Intrared dengan kos:

(1) Tindakan Intrared menggantung pembayaran adalah salah dan melanggar SSPA. Kemudaratan pelanggaran tersebut telah dibuktikan oleh fakta bahawa ia sedar pembayaran baki harga belian mengalir ke arah memenuhi kewajipan pembayaran balik plaintif kepada Bank Rakyat (lihat perenggan 72).

(2) Sebelum memasuki SSPA, peguam Intrared telah mengakujanji ketekunan wajar yang membuat rujukan nyata kepada PP. Oleh kerana peguam-peguamnya mempunyai pengetahuan penuh kewujudan PP, Intrared dianggap telah mempunyai pengetahuan bukan sahaja wujudnya PP tetapi juga akan kandungannya. Hujahan bahawa ia hanya menyedari kewujudan klausa 47 dalam PP terkemudian tidak dapat dipertahankan dan kurang kredibel (lihat perenggan 70 & 72).

(3) Fakta bahawa plaintif membantu Intrared berkenaan kontrak dengan Prestige Scale dan Glomac bagi klausa 47 tidak dalam cara jua menjejaskan, membatalkan, menafikan atau mengetepikan kewajipan Intrared untuk membayar plaintif-plaintif di bawah SSPA (lihat perenggan 84).

(4) Fakta bahawa Intrared dan KFH memutuskan pada masa yang sama untuk tidak menjalankan kewajipan berasingan mereka di bawah dua kontrak yang berbeza membuktikan tindakan bersepadu atau suatu perjanjian atau gabungan tindakan oleh mereka terhadap kepentingan ekonomi plaintif-plaintif. Kedua-dua entiti sedar kesan tindakan mereka pada obligasi pembayaran balik pinjaman plaintif kepada Bank Rakyat (lihat perenggan 108 & 137).

(5) Bukti menunjukkan Intrared berdendam dan menuduh Deepak bagi kewujudan klausa 47 dan kerana didakwa gagal untuk memberitahu mereka. Kewujudan dendam tersebut boleh diinferenskan oleh tindakan Intrared dalam melanggar obligasinya sedangkan pelanggaran tersebut tidak boleh, di sisi undang-undang, mengurangkan masalah yang disebabkan oleh klausa 47. Keputusan untuk memberhentikan pembayaran untuk satu tujuan, iaitu untuk menyebabkan kerugian kepada plaintif dengan menyebabkan mereka gagal dalam pinjaman Bank Rakyat (lihat perenggan 144).

(6) Hujahan Intrared bahawa ia tidak dapat menamatkan sama ada SSPA atau SPA tidak boleh dibelai. Terdapat *recourse* untuk menamatkan perjanjian dengan plaintif dan ia bukan alasan untuk menghujahkan plaintif 'berkemungkinan tidak mampu untuk membayar balik wang'. Sedemikian adalah tindakan undang-undang yang sepatutnya digunapakai dan bukannya pelaksanakan pelanggaran SSPA yang tidak memperuntukkan remedi bagi SPA antara Prestige Scale dan Glomac. Satu-satunya kesimpulan yang boleh dibuat adalah bahawa Intrared dan KFH bertujuan untuk menjejaskan kepentingan-kepentingan ekonomi plaintif-plaintif. Walaupun diterima bahawa Intrared sengaja berhenti memenuhi obligasi kontrak untuk melindungi atau menggalakkan kepentingan ekonominya sendiri, adalah mencukupi untuk memenuhi komponen minda atau 'niat' yang diperlukan bagi tort konspirasi untuk menjejaskan (lihat perenggan 149, 151 & 153).

(7) Ketiadaan KFH sebagai pihak dalam tindakan tersebut tidak menghalang plaintif-plaintif daripada meneruskan dengan atau berjaya dalam tort konspirasi untuk menjejaskan. Tiada bukti plaintif telah secara sukarela mengeluarkan KFH berhubung kausa tindakan dalam konspirasi (lihat perenggan 170).

(8) Tabir pemerbadanan Prestige Scale tidak sepatutnya disingkap kerana ia tidak semata-mata bertanggungan kepada plaintif-plaintif bagi pelanggaran kontrak dan konspirasi untuk menjejaskan. Prestige Scale juga tidak digunakan sebagai alat atau bahan untuk menyembunyikan liabiliti Intrared bagi salahlakunya (lihat perenggan 191 & 190 (v)).

(9) Plaintif telah berjaya dalam membuktikan bahawa mereka telah mengalami pengenaan caj bayaran lewat dan faedah berjumlah RM1,011,497.41 oleh Bank Rakyat. Ia adalah akibat semulajadi dan mudah dijangkakan atas kegagalan untuk membayar ansuran pinjaman yang perlu dibayar di bawah kemudahan tersebut pada masa yang ditetapkan. Punca bagi levi jumlah tersebut merupakan pelanggaran kontrak oleh Intrared (lihat perenggan 210).

(10) Akibat konspirasi untuk menjejaskan bahagian Intrared dan KFH, plaintif kehilangan nilai kredit mereka kerana diletakkan dalam senarai pemungkir dan mereka berhak ke atas pampasan bagi kerugian tersebut. Syarikat mereka juga mengalami kerugian kewangan akibat kekurangan pembiayaan selanjutnya. Memandangkan ini merupakan bukti komposit, sejumlah RM1 juta adalah pampasan yang munasabah untuk kerugian yang dialami. Jumlah tersebut adalah terhutang ke atas plaintif sama ada kausa tindakan kerosakan timbul daripada pelanggaran kontrak atau daripada konspirasi untuk menjejaskan (lihat perenggan 242, 247 & 248).]

Notes

For a case on tort of conspiracy to cause economic damage, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 106.

Cases referred to

A Company Re [1985] BCLC 333 (refd)

Adams v Cape Industries Plc [1990] Ch 433, CA (refd)

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal [2012] 4 MLJ 72, CA (refd)

Banning v Wright (Inspector of Taxes) [1972] 2 All ER 987, HL (refd)

Barrett Bros (Taxis) Ltd v Davies [1966] WLR 1334, CA (refd)

Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)

Bumiputra-Commerce Bank Bhd v Top-A Plastic Sdn Bhd [2008] 5 MLJ 34; [2008] 5 CLJ 737, CA (refd)

Cutler v MacPhail [1962] 2 All ER 292, CA (folld)
Faiza Ben Hashem v Abdulhadi Ali Shayif [2008] EWHC 2380, HC (refd)
Fish & Co Restaurants Pte Ltd v Revenue Valley Sdn Bhd & Ors [2010] 1 LNS 432 (refd)
Hadley v Baxendale (1854) 156 ER 145 (refd)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)
Kuwait Oil Tanker Co SAK and another v Al Bader [2000] 2 All ER (Comm) 271, QBD (refd)
Lonrho Ltd v Shell Petroleum Ltd (No 2) [1982] AC 173, HL (refd)
Lonrho plc v Fayed [1992] 1 AC 448, HL (refd)
Lonrho v Fayed No 5 [1993] 1 WLR 1489, CA (refd)
Mayban Trustees Berhad v CIMB Bank Bhd and other appeals [2012] 2 MLJ 187, CA (refd)
Meretz Investments NV v ACP Ltd [2008] Ch 244, CA (refd)
OBG Ltd v Allan [2008] 1 AC 1, HL (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Premah Karuppiah v Arab Malaysian Eagle Assurance Bhd [2003] 4 MLJ 51, HC (refd)
R v Siracusa and others 90 Cr App Rep 340, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)
Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another [2008] SGCA 8 TAB 23, CA (refd)
SCK Group Bhd v Sunny Liew Siew Pang [2011] 4 MLJ 393; [2010] 9 CLJ 389, CA (distd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Spring v Guardian Assurance plc [1995] 2 AC 296, HL (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)
Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd [1984] 2 MLJ 313; [1984] 1 CLJ 325 (refd)
Vellasamy Ponnusamy & Ors (on their behalf and for the 213 Sub-Purchasers of plots of land known as PN 35553, Lot 9108, Mukim Huton Melintang, Hilir Perak) v Gurbachan Singh Bagawan Singh & Ors [2010] 5 MLJ 437; [2012] 2 CLJ 712, CA (refd)
Wallersteiner v Moir [1974] 1 WLR 991, CA (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 114(g)

AM Pillai (Dato' Firoz, Cheng Mai & Chong Ian Shin with him) (Arulampalam & Co) for the plaintiff.

Effendy Othman (Sabarina Samadi Loy Ee Lin and Justin Wee with him) (Zaid Ibrahim & Co) for the first defendant.

Liza Chan (Chew Chang Min with her) (Liza Chan & Co) for the second defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] This dispute emanates from a conflict that arose primarily between the first plaintiff, one Deepak Jaikishan a/l Jaikishan Rewachand, and the first defendant, Intrared Sdn Bhd, an entity that is a subsidiary of the financial institution known as Kuwait Finance House (M) Sdn Bhd. The plaintiffs also enjoyed a banker-customer relationship with the latter.

[2] As a consequence of the conflict, which related to the purchase of a commercial building that was in the process of being constructed, the plaintiffs claim that they have suffered vast losses arising from the acts of the first defendant, Intrared, which the plaintiffs maintain amount to a breach of contract.

[3] Further or alternatively, the plaintiffs maintain that the first defendant conspired with Kuwait Finance House (M) Sdn Bhd to cause them injury, and caused immeasurable loss to the plaintiffs', particularly the first plaintiffs, credit reputation.

[4] The first defendant categorically denies these allegations, in so far as the second defendant is concerned, the plaintiffs seek to establish that there are sufficient grounds for the corporate veil of the second defendant, a wholly owned subsidiary of Intrared, to be lifted such that it and Intrared are effectively one and the same.

THE JUDGMENT

[5] I summarise below the relevant paragraphs dealing with the several issues arising in the course of the judgment, which make for easier reference:

(a) the factual matrix underlying the case is set out under 'Salient facts' and spans paras 1–54;

(b) the issues arising for adjudication are set out at para 55;

(c) the cause of action premised on a breach of the share sale and purchase agreement between the plaintiffs and Intrared is dealt with at paras 57–71;

(d) the issue of waiver is dealt with at paras 72–89;

(e) the tort of conspiracy to injure is dealt with from paras 90–170;

(f) the issue of whether the corporate veil of the second defendant, Prestige Scale Sdn Bhd ought to be lifted is dealt with a paras 172–191;

(g) the issue of damages is dealt with from paras 192–249.

SALIENT FACTS

[6] The salient facts relating to this dispute are as follows:

THE PLAINTIFFS

[7] The plaintiffs in the original action, namely Deepak Jaikishan a/l Jaikishan Rewachand, the first plaintiff ('Deepak') and Ezul Ehsan bin Ismail, the second plaintiff ('Ezul') were the shareholders and directors of the second defendant, Prestige Scale Sdn Bhd from 23 October 2007 until 30 July 2008. One Sharizal bin Ahmad was also a Director of Prestige Scale.

PRESTIGE SCALE SDN BHD AND 'GLOMAC' TOWER

[8] In or around 2007, the two plaintiffs, through the corporate vehicle of Prestige Scale Sdn Bhd, where they were shareholders and directors, sought to purchase a commercial building that was in the process of being developed and constructed. The building, known as the Glomac Al Batha Tower KLCC ('the building'), was being constructed by the original owner, Glomac Al Batha Sdn Bhd ('Glomac'). The sale price of the building was RM576,853,150 based on an estimation of RM1,050 per sqft and RM50 per car park space.

KUWAIT FINANCE HOUSE (M) SDN BHD AND INTRARED SDN BHD

[9] In order to finance the purchase of the building, Prestige Scale sought financing from Kuwait Finance House (M) Sdn Bhd ('KFH'). KFH is a financial institution that offers financing facilities with Islamic features. KFH is also one of the shareholders of the first defendant in the original action. Intrared ('Intrared') was incorporated by KFH on 19 June 2008 and was

initially known as KFH Reetaj Sdn Bhd. Its founding shareholders, Dr Radzuan Rahman and Dato' CK Wong were both nominees for KFH.

FINANCING FACILITIES BETWEEN KFH AND PRESTIGE SCALE SDN BHD FOR THE PURCHASE OF 'GLOMAC' TOWER

[10] Pursuant to a letter of offer dated 25 October 2007, KFH offered a *Musyarakah* financing facility amounting to RM12m to Prestige Scale for the proposed project, namely the construction and purchase of the building. On 25 February 2008, KFH increased the financing to RM24m. It was a term of the *Musyarakah* financing facility that KFH was to be one of the equity partners in the project to the extent of 40%. In effect this amounted to a joint venture of sorts between Prestige Scale and KFH whereby the parties were jointly investing in the construction and purchase of the building from Glomac.

[11] The purchase of the ongoing project and building was negotiated by the following persons:

(a) Deepak, a director and shareholder of Prestige Scale at the time;

(b) KFH's representative and Director of Real Estate Advisory Division, Ms Siti Mariam;

(c) Maimunah, a director of KFH;

(d) Tengku Muadzman, relationship manager of KFH;

(e) Dato' Wong Choon Kee, a director of Intrared;

(f) JUBM, a professional firm of architects appointed by Prestige Scale to advise them on construction, including JUBM's managing director, one Mr Loo; and

(g) Messrs Radzlan Low and Partners, a firm of advocates and solicitors acting on behalf of Prestige Scale.

[12] The plaintiffs in the original action maintain, as appears to be borne out by the representatives at the negotiations, that decisions pertaining to the purchase of the project and building were taken on behalf of the purchaser, Prestige Scale, by the plaintiffs, as then directors, as well as the representatives of KFH who were the plaintiff's *Musyarakah* partners and Intared.

[13] The negotiations for the sale and purchase of this ongoing construction project and the building spanned a period of about six months, from the time when Prestige Scale paid an earnest deposit in October 2007 until the agreement was finalised in March 2008.

[14] The details pertaining to the somewhat lengthy and detailed negotiations are evident in the series of e-mails exchanged between the parties between January 2008 onwards. It would appear from a perusal of the same that numerous issues pertaining to the specifications and amendments to the same in relation to construction and engineering details were discussed in considerable and significant detail. It would appear that the specifications which were finally agreed upon by the parties differed quite considerably from the initial specifications, indicating the substantial modification that was effected in relation to technical details, the quality and costing of materials etc to meet the needs of the parties above.

[15] The purchaser, Prestige Scale, together with the representatives from KFH and Intrared, ensured in the course of negotiations that all requisite approvals were accorded prior to the signing of the final sale and purchase agreement. The procurement of a development order was stipulated a condition precedent to the agreement, whereby monies would be refunded if such order was not obtained. It was further stipulated that Glomac was obliged to deliver the building with vacant possession by a specific date, failing which liquidated damages would become payable to Prestige Scale Sdn Bhd. The full terms and conditions of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac were referred to in the course of trial.

[16] On 28 March 2008 Glomac and Prestige Scale executed a sale and purchase agreement ('SSA') whereby Glomac agreed to sell the project to Prestige Scale Sdn Bhd for the sale price of RM576,853,150 (on the basis of an estimation of RM1,050 per sqft and RM50 per car park space). Glomac duly made an announcement on Bursa Malaysia on 29 March 2008 of the said sale. Prestige Scale Sdn Bhd sought and procured further financing from KFH of RM8m as partial payment of the sale and purchase price for the said project. This sum was subsequently fully repaid to KFH by Prestige Scale on 30 June 2008.

SALE OF 'GLOMAC' TOWER VIDE SALE OF SHAREHOLDING OF PRESTIGE SCALE SDN BHD BY THE PLAINTIFFS

[17] At this point of time, when Prestige Scale sought this further financing, Deepak and Ezul, as shareholders of Prestige Scale Sdn Bhd made it known that they wanted to sell their shares in Prestige Scale Sdn Bhd. According to Deepak, they made it known that they had received two potential offers for the purchase of the building from two parties, one foreign and the other local.

[18] As the plaintiffs were desirous of selling their shares in Prestige Scale Sdn Bhd, they needed to ascertain the redemption sum remaining due and owing to KFH in respect of the financing they had procured to date for the purchase of

the project. To this end, Prestige Scale sought to ascertain the quantum of the redemption sum owed to KFH. KFH responded vide letter dated 9 July 2008 advising that in the event Prestige Scale wished to terminate the said *Musyarakah* facility, it would have to pay KFH the sum of RM28m within a period of 28 days (there is in effect more than one version of this letter, which has given rise to allegations of forgery but that will be considered subsequently). Prestige Scale responded stating that it did not wish to terminate the said facility but merely wished to ascertain the redemption sum.

[19] KFH then informed Deepak and Ezul that they wished to purchase the building. Representatives of KFH proposed that the shares of Prestige Scale be sold to KFH. Deepak and Ezul agreed, reluctantly according to Deepak, to sell the shares to KFH or a related entity which subsequently turned out to be Intrared. Their reluctance, Deepak claimed, emanated from the fact that KFH's offer was considerably less attractive than the other offers they stated they had received. However they were persuaded, Deepak testified, by KFH's demand for the repayment of the facility by KFH within seven days, as well as the fact that they both enjoyed other financing facilities with KFH where they were personal guarantors. According to Deepak, they were concerned that they would be prejudiced in the event they rejected KFH's request for the purchase of their shares.

[20] This however is strongly disputed by the defendants. Intrared and PW3, Dato' Jamelah Jamaludin, the CEO of KFH who was subpoenaed as a witness for the plaintiffs, testified to the contrary that the letter of 9 July 2008 from KFH referring to a termination of the *Musyarakah* facility was necessary because it was not possible to provide an estimate of such sum without the joint-venture between the parties coming to an end. Notwithstanding this dispute on the basis or rationale for the plaintiffs' acceptance of KFH's offer to purchase the building through the purchase of the entire shareholding of Prestige Scale Sdn Bhd's through KFH's subsidiary, Intrared, the fact remains that the plaintiffs did accept the offer by KFH.

[21] In this context it is relevant that KFH is a substantial shareholder of Intrared. Intrared was incorporated in June 2008 according to Deepak, as the vehicle used by KFH to acquire Deepak's and Ezul's shareholding in Prestige Scale Sdn Bhd. KFH's role in Intrared is borne out by the documents of incorporation which were lodged by KFH. Again, in relation to the purchase of the Glomac Tower, prior approval had to be procured from the board of KFH only after which Intrared issued its letter of acceptance of 23 July 2008. Intrared is located at the same offices as KFH.

INTRARED'S PURCHASE OF THE PLAINTIFFS' SHAREHOLDING IN PRESTIGE SCALE SDN BHD AND THEREBY THE BUILDING

[22] In or around 25 July 2008, Intrared entered into a sale and purchase

agreement to purchase shares that were held by Deepak and Ezul in Prestige Scale for the purchase price of RM117,684,874 ('the share sale and purchase agreement'). This sum included the 10%t deposit of RM57,685,315 paid to Glomac. Under the terms of the share sale and purchase agreement a deposit of RM63,685,270.90 was paid after all conditions precedent had been fulfilled pursuant to cl 4.1 of the agreement. The balance purchase price of RM53,999,603.10 was payable pursuant to Schedule 2 of the agreement after all the subsequent conditions had been fulfilled according to cl 4.2 of the share sale agreement.

[23] Deepak testified that the plaintiffs in the original action satisfied all the conditions precedent and the conditions subsequent as per cll 4.1–4.2. A due diligence was also conducted by Intrared through its solicitors, Messrs Mohamed Ridza & Co as well as their internal lawyer cum Director, one Patrick Chen. The financial due diligence was conducted by Intrared's Director, Dato' Wong as well as Siti Mariam. All issues raised were duly resolved. In any event, the representatives of KFH and Intrared had been privy to negotiations of the project and building culminating in the sale and purchase agreement between Glomac and Prestige Scale.

[24] Prior to the sale of Deepak and Ezul's shares in Prestige Scale Sdn Bhd to Intrared, their outstanding liabilities under the *Musyarakah* facility for a principal sum of RM24m were fully settled. Intrared duly became the registered shareholder of Prestige Scale Sdn Bhd in or around 30 July 2008. The change in shareholding was effected, although the balance purchase price in accordance with the share sale and purchase agreement of RM53,999,603.10 had not been paid in full. The purchase of the plaintiffs' shares in Prestige Scale by Intrared was financed by KFH.

[25] Upon the resignation of Deepak and Ezul as Directors of Prestige Scale Sdn Bhd, Dato' Wong and one Dr Radzuan Rahman became the Directors of Prestige Scale. They were also shareholders and directors of Intrared together with KFH.

BALANCE PURCHASE PRICE UNDER THE SHARE SALE AGREEMENT BETWEEN THE PLAINTIFFS AND INTRARED ASSIGNED TO BANK RAKYAT FOR REPAYMENT OF LOAN FACILITIES AFFORDED TO THE PLAINTIFFS

[26] In or around September 2008, after Intrared had paid a deposit for the purchase of the Prestige Scale shares, Deepak and Ezul obtained a financing facility from Bank Kerjasama Rakyat (M) Bhd ('Bank Rakyat') for a term loan which eventually totalled RM40m ('the term loan'). In consideration of the

grant of this facility by Bank Rakyat, Deepak and Ezul assigned all their rights on the balance purchase price under the share sale and purchase agreement to Bank Rakyat vide a deed of assignment dated 9 October 2008, addressed to Intrared.

[27] Intrared was therefore both aware of, and consented to the said assignment of proceeds. In order to give effect to this assignment, Deepak and Ezul also issued an irrevocable letter of instruction also dated 9 October 2008 whereby they gave irrevocable instructions to Intrared to pay the balance purchase price of RM40,000,000 under the share sale and purchase agreement to Bank Rakyat. Intrared in its acknowledgement expressly accepted that pursuant to those instructions they undertook irrevocably to remit the assigned amount due and payable to Deepak unless Bank Rakyat agreed in writing to such revocation. In other words it was an irrevocable and absolute assignment.

[28] As such, the RM40m that was due to the plaintiffs from Intrared, was to be paid directly by Intrared to Bank Rakyat with the consent of all parties. The net effect was that the principal term loan would be paid by Intrared directly to Bank Rakyat in accordance with Schedule 2 of the share sale and purchase agreement.

[29] In accordance with this arrangement, Intrared, vide letter dated 2 September 2008, advised Bank Rakyat that it would pay all of the balance purchase price for the Prestige Scale shares in accordance with cl 3.3 of the share sale and purchase agreement, the final payment being effected no later than 15 November 2012. Intrared confirmed that the sale of the shares in Prestige Scale Sdn Bhd had been completed and that it was the registered owner of the shares. It further confirmed payment of the balance purchase price would be made progressively in accordance with the share sale agreement and not later than 15 November 2012. On 5 September 2008, Intrared re-issued a letter to the same effect, adding that such repayment would be made by the date stipulated irrespective of progressive payments set out in the share sale agreement.

[30] Prior to this, in or around 7 August 2008, KFH had also issued a letter to Bank Rakyat to the effect that it had provided financing facilities to Intrared to finance the purchase of the Prestige Scale shares. On the same date, ie 7 August 2008, Intrared or KFH Reetaj Sdn Bhd as it was then known, undertook to forward directly to Bank Rakyat an 'unconditional and irrevocable' financial undertaking by a bank in respect of the balance purchase consideration outstanding, in favour of Deepak.

[31] KFH complied with Intrared's undertaking by issuing an irrevocable letter of undertaking dated 31 December 2008. Vide this letter, KFH

unconditionally and irrevocably undertook to pay to the plaintiffs or Bank Rakyat the remainder of the balance purchase consideration due to the plaintiffs, within seven business days of Intrared's receipt of the developer's notice, as set out in Schedule 2 of the share sale agreement. It is pertinent that the irrevocable letter of undertaking does not stipulate any requirement for a notice from Intrared to KFH authorising it to assign the proceeds. The letter of undertaking from KFH is a direct undertaking to the plaintiffs to pay them, or their assignee, upon Intrared receiving the requisite notice from Glomac, the developer, in accordance with the schedule of construction. In other words, KFH as Intrared's financier did not require any consent from its client to comply with the assignment or payment to the plaintiffs or Bank Rakyat.

[32] It is significant to note that the plaintiffs obtained this facility for RM40m from Bank Rakyat on the basis of the foregoing instruments, namely the letters of undertaking from Intrared and KFH, as well as the deed of assignment executed by the plaintiffs themselves in favour of Bank Rakyat. Bank Rakyat was assured of periodic repayment of this not insignificant loan, and accordingly the plaintiffs succeeded in procuring the same.

[33] Pursuant to these arrangements and the sale of the shareholding in Prestige Scale Sdn Bhd, and thereby the building to Intrared, payments under the share sale and purchase agreement were duly made as agreed above under these various instruments, until immediately prior to January 2011. Up to that date, Intrared had made payments of RM15,021,054.36 against the principal sum of the term loan directly to Bank Rakyat in accordance with the terms agreed upon between it and the plaintiffs.

THE BREAKDOWN IN THE RELATIONSHIP BETWEEN THE PLAINTIFFS AND INTRARED AND KFH

[34] However according to the plaintiffs, towards the end of 2010, Deepak and the new CEO of KFH, one Dato' Jamelah Jamaluddin and the Head of Credit Control, one Azman bin Abdul Malek had some problems in relation to some other financing facilities given to one of Deepak's other companies, namely one Premier Weavers Sdn Bhd. Arising from this dispute, Deepak procured the intervention of Bank Negara which duly resolved the dispute between the relevant parties. Deepak, on behalf of the plaintiffs, maintains that KFH remained unhappy about the manner in which the Premier Weaver dispute had been resolved with the due intervention of Bank Negara, and that KFH and thereby Intrared bore a grudge against the plaintiffs, particularly Deepak.

[35] This is disputed by the defendants, who maintain that the dispute in

relation to Premier Weaver is irrelevant to the dispute here between the plaintiffs and Intrared, the new shareholders of Prestige Scale.

[36] Intrared maintains that in or around January 2011 it learnt or found, upon sighting a copy of the development order dated 22 April 2008, that it contained a condition in para 47 which provided that only the developer of the building, Glomac, and its subsidiaries could occupy the office space in the building. All other sale or rental of office space to any other third party appeared to be prohibited. Given that the building had been purchased by Intrared primarily for the purposes of providing rental space for KFH and its conglomerate of companies, the prohibition contained in para 47 of the development order would preclude Intrared and KFH from utilising the building for the primary purpose for which they had purchased it.

INTRARED AND KFH CEASED TO MAKE PAYMENTS DUE UNDER THE SHARE SALE AGREEMENT TO BANK RAKYAT

[37] In accordance with the contents of the foregoing letter, in or around January and February 2011, Intrared defaulted on its letter of undertaking of 2 September 2008. KFH defaulted on its payment under the irrevocable letter of undertaking of 31 December 2008 and did not make the requisite payment to Bank Rakyat in January 2011. At the same time Intrared informed the plaintiffs that it would cease all principal payments to Bank Rakyat. Additionally Intrared advised the plaintiffs vide letters dated 31 January 2011, that it would halt all payments of the balance purchase price due under the share sale and purchase agreement, until the issue of the development order was resolved. It is not in dispute that pursuant to the foregoing, Intrared issued its letter of 31 December 2008 notifying the plaintiffs that:

(a) they had just sighted para 47 of the development order;

(b) the entire substratum of the share sale agreement was affected as far as they were concerned, which in effect meant that Intrared questioned the validity of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac as the purpose was to procure the building free from all encumbrances and with vacant possession; and

(c) as it was uncertain whether this purpose could be achieved, namely whether the building would be delivered free from encumbrances and vacant possession, Intrared had decided to withhold all further payments under the share sale agreement between itself and the plaintiffs until the issue of para 47 of the development order had been fully resolved. This in effect meant that Intrared, and KFH would not be making the payments they had undertaken to make to Bank Rakyat in respect of the financing facilities afforded by Bank Rakyat to the plaintiffs.

KFH also halted all payments as did Intrared.

DEEPAK'S RESPONSE

[38] Deepak responded to Intrared's letter of 31 January 2011, vide an undated letter, maintaining that the issue of the development order under the sale and purchase agreement between Prestige Scale and Glomac was essentially a matter between those parties and did not involve himself and Ezul, the previous shareholders, primarily because they had sold and transferred all their shares in Prestige Scale to Intrared. Deepak also gave notice to Intrared to continue all payments required in accordance with the share sale and purchase agreement directly to Bank Rakyat.

[39] In the interim however Prestige Scale, now owned by Intrared had contacted Glomac and were in communication with, and were having meetings with Glomac on the issue of the development order. This is evident from the correspondence dated 31 January 2011, 22 February 2011 and 1 March 2011 from Prestige Scale to Glomac.

[40] Notwithstanding the fact that the procurement of the development order was a matter between Glomac and Prestige Scale, Deepak maintains that he did, with the best of intentions and as a gesture of goodwill, seek to assist Intrared to resolve the matter. He contacted Glomac to discuss the said matter vide letter dated 28 February 2011. He kept Intrared advised. Intrared responded vide letter dated 1 March 2011 advising that until the issue of the development order was resolved, they would continue to withhold payments.

DISPUTE BETWEEN THE PLAINTIFFS AND INTRARED

[41] It is at this point that the real issue in dispute between the parties comes to the fore. As a consequence of this decision by Intrared not to honour the requisite payments due under the share sale and purchase agreement, the plaintiffs maintain that intrared is in breach of its obligations under the said agreement. Intrared, on the other hand maintains that there is no breach, as the procurement of the development order was a fundamental term of the sale and purchase agreement of the building between Glomac and Prestige Scale Sdn Bhd, which in turn comprises the fundamental substratum of the share sale and purchase agreement between the plaintiffs and Intrared. By procurement of the development order, Intrared meant a procurement of an order that allowed it to utilise the building as it saw fit including the utilisation of the building for the housing of its banking facilities as well as tenanting out rental space to offices and businesses other than the Glomac conglomerate of companies.

[42] If the development order could not be procured on these terms, then the

A construction project, and ultimately the building, which was the entire basis for these transactions, would be jeopardised and not come to fruition. As such the fundamental substratum for the share sale and purchase agreement would be destroyed.

B **[43]** Intrared therefore, denies any breach of the share sale and purchase agreement. Alternatively, Intrared maintains that even if there was such a breach, the intervention by Deepak as evidenced by the correspondence above to procure the development order, amounts to a waiver of the breach.

C **[44]** Intrared points to the fact that Deepak had not only acknowledged Intrared's concern, but also its position pertaining to the suspension of payments under the share sale and purchase agreement, when he wrote to Intrared vide letter dated 28 February 2011, stating that he had written to Glomac requesting for a meeting between the three parties and himself to D resolve the issue of the development order. They maintain that the plaintiffs no longer raised the issue of the suspended payments under the agreement.

[45] Deepak also wrote to Glomac highlighting that para 47 of the E development order prohibited any sale or rental of the building which was to be used solely by Glomac and its subsidiaries. Premised on these two letters of 28 February 2011 to Intrared and Glomac, Intrared maintains that the plaintiffs are estopped from asserting that the issue of the development order did not concern them since the plaintiffs had, by their positive conduct F acknowledged and affirmed the position taken by Intrared in respect of the suspended payments under the share sale and purchase agreement. Further or alternatively it is contended that Deepak's conduct amounts in effect to a waiver of the breach, if any, arising as a consequence of Intrared's decision to suspend all payments pending resolution of para 47 of the development order.

G **[46]** Glomac responded to Deepak's letter of 28 February 2011 informing him that the issue pertaining to the development order was between Glomac and Prestige Scale and did not involve him.

H **[47]** Intrared and KFH suspended payments due under the share sale and purchase agreement and the irrevocable letter of undertaking in the total sum of RM17,999,867.70 to Bank Rakyat as and when they fell due. Intrared, the plaintiff complains, had procured KFH to withhold payment under the irrevocable letter of undertaking notwithstanding that it was termed I irrevocable and unconditional and created an independent obligation on the part of KFH.

[48] Almost four months later, in or around 23 May 2011 Glomac advised Prestige Scale Sdn Bhd that the condition in para 47 of the development order

had been cancelled by Dewan Bandaraya Kuala Lumpur ('DBKL'). As a consequence of such cancellation, it followed that the building could be utilised by KFH and its subsidiaries. Additionally Intrared could rent the space out to other third parties as office space.

[49] Intrared had then, in accordance with the position it had taken vide its letters dated 16 May 2011, 5 May 2011, 1 March 2011, 22 February 2011 and 31 January 2011, effected the requisite payments totalling RM17,999,867.70 vide telegraphic transfer to Bank Rakyat on 9 June 2011.

[50] The plaintiffs complain that as a consequence of this late payment they have suffered loss and damage in respect of which they seek recompense. In the course of his evidence on behalf of the plaintiffs, Deepak detailed such loss as follows:

(a) Bank Rakyat charged the plaintiffs interest or 'profit' in Islamic financing terms as well as late penalty charges for the late payment for the period from January 2011 until July 2011. This totals RM1,011,497.41;

(b) damages for losses incurred as a consequence of Bank Rakyat withdrawing the term loan and demanding for repayment and for the plaintiffs' names being inserted in Bank Negara's defaulters list also known as the Central Credit Risk Information System Services; and

(c) damages for loss of reputation, goodwill and opportunity to invest in other high value transactions until this issue had been resolved.

[51] He went on to explain that as a consequence of being placed on the credit default list, the plaintiffs were unable to obtain any financing from other financial institutions in Malaysia until this issue was cleared up, namely between January 2011 and June 2011. He went on to elaborate on several contracts which he claimed he could not pursue or become involved in as he could not procure financing from any of financial institutions (the details of the same will be considered later on in the judgment).

LOSSES CLAIMED BY THE PLAINTIFFS

[52] The contingent or potential losses he claims to have suffered from these contracts which failed to come into fruition run into several millions of ringgit. Deepak sought to produce documentation to substantiate such 'potential' losses. These contracts essentially comprise the failure of the second plaintiff's company, one Reliance Pillar Sdn Bhd, to procure a contract for the supply of rice to the Government of Malaysia and Padiberas National Bhd where the plaintiffs claim they suffered a loss of profit of RM19m a month. Deepak was a consultant to Rice Pillar Sdn Bhd.

[53] A second contract pertained to a company known as Astacanggih Sdn Bhd. Stated to be connector to Deepak, which had purchased lands in Bukit Raja Klang and intended to on sell the same to another purchaser for a profit. However as this entity, Astacanggih Sdn Bhd, was unable to procure funding to complete the purchase of the subject land it could not then on sell the property and accordingly, Deepak claims, suffered a loss of profit of approximately RM62m.

[54] The foregoing then sets out the background facts pertaining to the basis of the plaintiffs' claim which is premised on breach of contract and loss and damage suffered thereby.

CONSPIRACY TO INJURE

[55] A perusal of the statement of claim will disclose that in addition to the foregoing cause of action premised on breach of contract the plaintiffs also plead a cause of action founded on the economic tort of conspiracy to injure. Entitled 'conspiracy to injure economic interest of the plaintiffs' it is pleaded that Intrared and KFH conspired between themselves with the predominant purpose of injuring the plaintiffs' economic interest by procuring a breach of the share sale and purchase agreement and the irrevocable letter of undertaking which caused the plaintiffs to suffer loss and damage.

[56] In fact the suit against KFH which was originally a party to this action was discontinued on 27 December 2011, pursuant to the grant of time/indulgence for repayment of monies due by another entity related to Deepak, namely one Premier Weavers Sdn Bhd.

[57] The particulars of the conspiracy pleaded are that after the referral to Bank Negara of a complaint by the plaintiffs arising from the dispute between the plaintiffs and the CEO of KFH, Dato' Jamelah Jamaluddin, KFH and Intrared agreed to procure a breach of the share sale and purchase agreement and the irrevocable letter of undertaking by withholding payment under the same. It is contended that pursuant to such agreement KFH and Intrared did so withhold the requisite payments. In other words the plaintiffs' case is that KFH and Intrared instructed the cessation of payments to Bank Rakyat under the share sale and purchase agreement and the irrevocable letter of undertaking with the predominant intention of causing injury to the plaintiffs' economic interest by reason or because of the dispute between Dato' Jamelah Jamaluddin as CEO of KFH, and the plaintiffs in relation to the complaint to Bank Negara over the Premier Weaver account.

[58] The plaintiffs complain that by reason of such withholding of repayments, Intrared and KFH procured or induced the plaintiffs to breach

their contract with Bank Rakyat, as the failure to repay amounted to a default of their term loan repayment. They further complain that Intrared and KFH withheld payment with the knowledge that on default the plaintiffs would be categorised as defaulters who would then have difficulty procuring financing.

[59] The plaintiffs have joined or included Prestige Scale as a party to the original action, maintaining that it and Intrared are effectively one and the same. As against the second defendant, Prestige Scale Sdn Bhd, which is a wholly owned subsidiary of Intrared Sdn Bhd, the plaintiffs seek that the corporate veil be lifted maintaining that Prestige Scale Sdn Bhd and Intrared effectively comprise part of the same economic entity. In support of this proposition they point to the fact that Prestige Scale is the wholly owned subsidiary of Intrared. The board of directors of Intrared and Prestige Scale are identical. Their company secretary and registered address are identical as borne out by the company search results. Prestige Scale was the entity utilised by Intrared for the purposes of acquiring the building.

[60] The doctrine of the lifting of the corporate veil does not form a cause of action in itself. It appears from the plaintiff's pleadings that the cause of action against Prestige Scale Sdn Bhd is premised on whether the causes of action pleaded against Intrared, namely both in breach of contract and conspiracy to injure are in fact made out against Intrared. If so, then the plaintiffs seek the remedy of the lifting of the veil to ensure that they procure the monetary remedy they seek. The plaintiffs contend that if Intrared is found liable to the plaintiffs under these heads or causes of action, then the 'justice' of the case requires that Prestige Scale Sdn Bhd, as the alter ego of D2 be also found liable severally for the said sum. I can only conclude so from a perusal of the statement of claim where the plaintiff pleads specifically that: '… the Plaintiffs contend that in the event the 1st Defendant is found liable to the Plaintiffs for breach as alleged, the justice of the case demands that the 2nd Defendant, being the alter ego, same economic entity, agent and/or trustee of the 1st Defendant, also be found liable for the same'. The term 'breach' can only refer to a breach of contract.

[61] In short, the plaintiffs seek to have this court lift the corporate veil in order to recover any monies or damages that they seek against Intrared for breach of contract and/or conspiracy to injure.

[62] These then comprise the primary issues for resolution by this court:

(a) was there a breach of the share sale and purchase agreement by Intrared when it withheld, failed and/or omitted to pay sums agreed to be paid to Bank Rakyat when the amounts fell due?

(b) if so, was there a waiver of such breach by the plaintiffs vide their letters of 28 February 2011 and their conduct?

(c) if there was no waiver, what is the loss suffered by the plaintiffs, if any?

(d) are Intrared and KFH liable for the tort of conspiracy to injure the plaintiffs by causing the plaintiffs to suffer economic loss as a consequence of Intrared's and KFH's breach of the share sale and purchase agreement and the irrevocable letter of undertaking respectively, which led directly to the plaintiffs defaulting under their repayment terms with Bank Rakyat? and

(e) should the corporate veil of the second defendant, Prestige Scale Sdn Bhd be lifted on the grounds of the alleged unconscionable conduct of the defendants or because the justice of the case demands it if either the cause of action in breach of contract or conspiracy to injure is established by the plaintiffs?.

[63] It must be said at the outset that in this claim a significant proportion of the evidence pertaining to the issues above turns on documentary evidence rather than purely oral evidence. This is because the relationship between the parties was signified throughout by attendant correspondence. This made it easier for the court to draw inferences and make conclusions in that there was documentary evidence which comprised a contemporaneous paper trail, detailing the parties' various actions.

Was there a breach of the share sale and purchase agreement by Intrared when it withheld, failed and/or omitted to pay sums agreed to be paid to Bank Rakyat when the amounts fell due?

[64] The salient facts leading up to the failure or omission on the part of Intrared to pay sums agreed to be paid to Bank Rakyat as and when they fell due, has been set out above. PW1, Deepak, set forth the sequence of events from the onset of the relationship between the parties right up to what he termed the 'breach' of the share sale and purchase agreement. I found him to be a truthful witness whose evidence was borne out by the contemporaneous documents he produced in support of his case. In relation to the alleged breach, it is not in dispute that Intrared withheld sums of monies that were due under the said share sale and purchase agreement. Pursuant to the terms of the share sale and purchase agreement Intrared was supposed to make the following payments:

(a) under item 3(d) of Schedule 2 of the share sale and purchase agreement for completion of the internal walls, pursuant to a certificate of completion dated 27 January 2011, the sum of RM5,999,955.90;

(b) under item 3(e) of Schedule 2 of the share sale and purchase agreement, for completion of internal electrical wiring etc pursuant to a certificate of completion dated 29 April 2011, the sum of RM5,999,955.90; and

(c) under item 3(f) of Schedule 2 of the share sale and purchase agreement, on completion of plastering, the sum of RM5,999,955.90.

[65] Under the terms of the share sale and purchase agreement payment fell due within 14 days from the developer's notice. Notwithstanding the issuance of the relevant notices, Intrared failed to make the requisite payments due. As a consequence the sum of RM17,999,867.70 due and payable to Bank Rakyat variously under the deed of assignment, letter of instruction and irrevocable letter of undertaking, remained unpaid.

[66] As stated at the outset these facts are not in issue. Goh Yeah Pang, ('DW1') in the course of cross-examination stated as follows:

Q: 'So you did receive the Developer's Notice?

A: Yes

Q: And no payment was made?

A: No'

Q: You are familiar with this document. Remember this morning you told the Court that the payment arrangements under the SPA and SSA were a mirror image, remember?

A: Yes

Q: Kindly have a look at paragraph 2. Let me read to you the important parts to you very quickly,: in consideration of the Vendor agreeing to sell to the Purchaser the property and the vendor agreeing to the assignment of all the purchaser's rights, title and interest in and to the property and under the SPA to us as security for facilities granted to the purchaser, we KFH Malaysia Berhad, hereby unconditionally and irrevocably undertake and covenant to pay to the vendor the instalments as defined in the SPA progressively in accordance with the second schedule of the SPA …'

A: Yes

…

Q: '… and in any event, within 14 business days as defined in the SPA, upon production to us of the requisite commencement certificate and the completion certificate as defined in the SPA under the hand of the project architect'. Do you agree with me that the bank independently received from the developer - the certificates which would be required for payments? Do you agree?

A: Receipt by us means receipt by Prestige Scale Sdn. Bhd. which is the company that applied for the bank loan from KFH Malaysia

…

Q: The word here 'us' is referring to who?

A: Kuwait Finance House Berhad

…

Q: Now, you accept taht the three payments which were due to the Plaintiff were suspended?

A: Yes

[67] Intrared eventually made a late payment of the sum of RM17,999,867.70 in June 2011 after the issue arising from the condition stipulated in the development order had been fully resolved. This was, however, in breach of the time line stipulated in the share sale and purchase agreement.

[68] Intrared in response to the foregoing, denies that it is in breach of the share sale and purchase agreement. It maintains that in view of para 47 of the development order which prohibited the utilisation of the building by third parties other than Glomac and its subsidiaries, the entire substratum of the share sale and purchase agreement was affected, as the underlying objection of the agreement which was the acquisition of the property for the specific purpose envisaged, would not be sustainable. Accordingly Intrared maintains that this calls into question the validity of the share sale and purchase agreement. Intrared further maintains that as it was uncertain whether the building could or could not be delivered free from encumbrances and with vacant possession, Intrared felt that it was justified in informing the plaintiffs that it had no choice but to suspend payments under the share sale and purchase agreement until the issue of development order was resolved.

[69] Intrared in essence maintains that its decision to halt payments due under the share sale and purchase agreement is justified as there was a real concern that it would not be able to procure the building for its use as the plaintiffs well knew and understood when entering into the agreement. Under recitals B–C of the share sale and purchase agreement there was an express stipulation that Intrared had vide the agreement acquired the building as an office building with a specified area and car parks. Deepak, it is pointed out, was well aware that the only reason Intrared entered into the share sale and purchase agreement was to acquire the building.

[70] It was Intrared's position that the contents of the development order were only brought to their attention in January 2011 when a copy was provided by the developer, Glomac to Prestige Scale Sdn Bhd. According to Intrared, it was only then that Intrared and Prestige Scale Sdn Bhd went through the order and came across condition 47. Intrared points to the fact that under the

agreement the plaintiffs had warranted that Prestige Scale was not bound or affected or subject to any encumbrance. However condition 47 was a breach of that warranty. Intrared complained that the plaintiffs ought to have provided written notification to Intrared pertaining to this condition, which they had not. It was put to Deepak that by reason of the existence of condition 47, the warranty provided by the plaintiffs was unfulfilled or was misleading and incorrect. However Deepak refused to agree to this.

[71] In summary Intrared maintains that pursuant to the principles of good faith, the plaintiffs were under an obligation prior to the entry into the share sale and purchase agreement to inform or notify Intrared of the contents of the development order more particularly condition 47. The failure to do so according to them was a breach of a specific warranty and therefore the plaintiffs were not entitled to take advantage of their own 'wrong' to establish or complain of a breach of contract by Intrared. The fact that there was a possibility that the building could not be utilised by KFH to house its banking activities and the activities and business of its subsidiaries by reason of the contents of condition 47 was sufficient, in Intrared's view, to warrant a cessation of payments due under the share sale and purchase agreement until such time as it deemed fit, namely until the condition was removed. And if the condition was not removed the suspension of payment would, presumably continue indefinitely.

[72] The plaintiffs respond to this by pointing out, validly, it appears to this court, that under the share sale and purchase agreement Intrared had undertaken a separate and distinct obligation which was quite separate and disparate from the provisions of the sale and purchase agreement between Glomac and Prestige Scale Sdn Bhd. Intrared had after all acquired from the plaintiffs all the shares in Prestige Scale Sdn Bhd so as to 'step into the shoes' of the plaintiffs as shareholders of Prestige Scale Sdn Bhd and thereby acquire the building. Intrared had purchased the plaintiffs shares and not the building directly vis a vis Intrared and the plaintiffs. Under the express terms of the share sale and purchase agreement, Intrared had agreed to abide by its obligation to pay the balance purchase price consideration notwithstanding payments being made by Prestige Scale Sdn Bhd to Glomac:

> For the avoidance of doubt, the payment of the Balance Purchase Consideration based on Developer's notice of the relevant milestones/events as stated above shall fall due within the 14 days of the Developer's notice regardless of whether payment is made by the Company to the Developer or the order in which the Developer's notice of the relevant milestone/event is issued.

[73] In other words Intrared's payment obligations under the share sale and purchase agreement to Bank Rakyat on behalf of the plaintiff as payment for

the sale of the shares in Prestige Scale Sdn Bhd is quite distinct and separate from Prestige Scale Sdn Bhd's obligations to pay Glomac under its sale and purchase agreement for the building.

[74] Further cl 3.3 of the share sale and purchase agreement envisages that even if Prestige Scale Sdn Bhd does not acquire the building, Intrared still has to pay the plaintiffs the entire balance purchase consideration for the shares acquired in Prestige Scale Sdn Bhd.

Clause 47 of the development order

[75] In any event the development order and its contents are primarily an issue that concern Prestige Scale Sdn Bhd and Glomac. Under the provisions of the share sale and purchase agreement the plaintiffs were not under any duty to provide vacant possession of the building to Intrared. It is in fact Glomac that is bound to provide vacant possession of the building to Prestige Scale Sdn Bhd. Therefore it can be no excuse or justification for Intrared to cease or suspend payments due under an independent and distinct obligation on the grounds that there subsisted a condition in the development order which affected Intrared's or Prestige Scale's interests in respect of the building. DW1 accepted the same in the course of his evidence:

(Q:) Whose obligation was it to give vacant possession? Was it the obligation of Glomac or was it the obligation of the plaintiffs?

(A:) It is Glomac.

(Q:) Not the plaintiffs?

(A:) Yes

(Q:) So it wasn't the plaintiff's obligation to give vacant possession, you accept that?

(A:) Yes

…

And further on:-

(Q:) Can I refer you to the SPA between PSSB and Glomac at page 9 of CBD-1, Clause 2. Do you agree that by virtue of Clause 2, PSSB had full rights against Glomac in the event that the building was not delivered with vacant possession?

(A:) Yes

Intrared's knowledge of the subsistence of the development order

[76] In any event it is also relevant that prior to entry into the share sale and

purchase agreement between the plaintiffs and Intrared for the acquisition of the entire shareholding of Prestige Scale Sdn Bhd, a due diligence exercise was undertaken by Intrared's solicitors, Messrs Mohd Ridza. Vide letter dated 13 August 2008 to Glomac's lawyers, Intrared's solicitors make express reference to the development order. They state that they had noted that one of the conditions precedent of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac is the approval of the final development order to be procured by Glomac from Dewan Bandaraya Kuala Lumpur. They sought confirmation that DBKL had in fact approved the building plans and that the development order was the final one. It follows from the foregoing letter that Intrared's solicitors had full knowledge of the subsistence of the development order and accordingly Intrared is presumed to have knowledge not only of the subsistence of the same, but also the contents.

[77] DW1 also conceded in the course of cross-examination that Intrared had known of the development order since August 2008, some three years earlier. He accepted that for three years, Intrared had not raised the issue of condition 47 despite having knowledge of the subsistence of the development order. He also accepted that Intrared's solicitors had in fact considered the development order and professionally advised Intrared. He also accepted that the plaintiffs had provided full disclosure of the development order three years prior to Intrared raising it as an issue and suspending payments.

[78] Dato' CK Wong, ('PW2') who was a director of Intrared at the outset and the material time, also testified that Intrared had conducted a due diligence exercise prior to entry into the share sale and purchase agreement with the plaintiffs in respect of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac. He testified that Intrared was aware of the development order through Intrared's firm of solicitors. He maintained that he, as a director, was aware of the existence of the development order. From the foregoing evidence, Intrared's stance that it only became aware of the existence of condition 47 in the development order subsequently in April 2011, is untenable and less than credible. By reason of the due diligence, whereby its lawyers carried out a full inspection of all relevant matters pertaining to the construction and sale of the building, Intrared ought to have been aware, and was as a matter of fact fully aware of the existence of the development order. This is perhaps the most persuasive evidence of the subsistence of a breach on the part of Intrared. This evidence shows that Intrared, having knowledge of the development order, if not perhaps the precise contents, on ascertaining the same subsequently sought to and did in fact renege from its contracted obligations under the share sale and purchase agreement. It is no justification in these circumstances for Intrared to contend that it was entitled to do so by suggesting non-disclosure on the part of the plaintiffs when its own solicitors clearly had full knowledge of the development order, and ought to have been

fully conversant with the contents of the same and advised Intrared accordingly. It is clear to this court that Intrared's act of suspending payment indefinitely was wrongful and amounted to a breach of the share sale and purchase agreement. The gravity of the breach is further borne out by the fact that Intrared was aware that the payment of the balance purchase consideration would go towards meeting the plaintiffs' repayment obligations in respect of facilities it had procured from Bank Rakyat. I therefore conclude that the plaintiff has proved on a balance of probabilities that Intrared did breach its obligations under the share sale and purchase agreement causing the plaintiffs to suffer loss and damage.

Was there a waiver of such breach by the plaintiffs vide their letters of 28 February 2011 and their conduct?

[79] Intrared maintains by way of defence that even if there was a breach of the share sale and purchase agreement arising from its cessation or suspension of payments due to or on behalf of the plaintiffs, the plaintiffs had waived their rights and are estopped from pursuing any claim for loss in relation to the suspended payments. It submits that in order to ascertain whether waiver and estoppel are established against the plaintiffs it is necessary to consider the chronology of events following upon Intrared's letter stating that it had 'just' discovered the development order. Bearing in mind that this statement in itself is not reliable, the salient events that Intrared points to in support of its claim of waiver areas follows.

[80] Intrared points to its letter of 31 January 2011 when it first advised the plaintiffs of its intention to suspend payment under the share sale and purchase agreement. At this time it highlights that there was no payment due to the plaintiffs under the agreement as yet. Pursuant to Intrared's letter, Deepak issued an undated without prejudice letter notifying them that the development order was an issue between Prestige Scale Sdn Bhd and Glomac and that Intrared should honour its obligations. It is clear that this cannot amount to a waiver.

[81] Intrared refused to alter its position whereupon Deepak wrote his letter of 28 February 2011 stating that he had written to Glomac requesting for a meeting to be held between all three parties to address the issue of the development order. He also wrote to Glomac seeking a meeting and highlighting the existence of cl 47 in the development order.

[82] Glomac responded that the development order was an issue between Prestige Scale and itself and did not involve Deepak. Deepak did not respond after this, notwithstanding that Intrared maintained its position and wanted a meeting held to resolve this matter as soon as possible. Intrared points to the

fact that the plaintiffs did not respond for a period of three months, to contend that this amounts to a waiver of Intrared's breach. In other words, Intrared contends that because Deepak did not consistently write to Intrared alleging on each occasion that Intrared had committed a breach of the agreement, and had instead sought to arrange a meeting with Glomac to resolve the issue, that the plaintiffs had effectively waived or accepted as justified, Intrared's decision not to honour its contracted obligations under the share sale and purchase agreement. Deepak and Ezul as the plaintiffs vigorously contest this suggestion. Deepak maintained in the course of his evidence that he was merely trying to assist Intrared to resolve Prestige Scale Sdn Bhd's problem with Glomac in relation to the development order but that this in no way meant that he had absolved Intrared of its contractual obligation to make payments due under the agreement.

[83] Having considered the entirety of the evidence in this suit, it appears to this court that in an effort to justify what was clearly a breach of express obligations undertaken by Intrared under the share sale and purchase agreement, entry into which was fully endorsed by its legal advisers, Intrared seeks to rely on the doctrines of waiver and estoppel to avoid the consequences of its clear breach of the provisions of the said agreement.

[84] Intrared relies on and cites the case of *Barrett Bros (Taxis) Ltd v Davies* [1966] WLR 1334 in support of its contention of waiver, where Lord Denning stated:

> The principle of waiver is simply this. If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would inequitable for him so to do.

[85] And in *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987, referred to in *Premah Karuppiah v Arab Malaysian Eagle Assurance Bhd* [2003] 4 MLJ 51, Lord Hailsham stated as follows:

> Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach.

[86] Intrared also relies on cl 9.2 of the share sale and purchase agreement to establish the existence of such waiver on the part of the plaintiffs. The said

clause provides that in the event of a breach by the purchaser, ie Intrared of any term of the agreement, then the purchaser is deemed to be in breach of the agreement and the vendors, ie the plaintiffs shall be entitled to require the purchaser to rectify such breach within 14 days from the date of written notice to Intrared. Intrared maintains that despite its letters of 31 January 2011 and 22 February 2011 to the plaintiffs stipulating that it would suspend payment, the plaintiffs did not give a written notice to Intrared requiring them to rectify their breach on payments due under Schedule 2.

[87] It is not in dispute however that upon receipt of the letter of 31 January 2011, the plaintiffs through Deepak wrote a letter to Intrared maintaining that Intrared was to continue with payments due to the plaintiffs as per the share sale and purchase agreement directly to Bank Rakyat. Is this letter then to be ignored? Does it follow that because the said letter does not utilise the express words 'you are in breach of the agreement and are required to make payments due immediately to rectify such breach' that it does not comprise a demand or notice as is envisaged in cl 9.2? It appears to this court that it is not possible to ignore this clear demand for Intrared to rectify its breach by resuming payments due under the share sale and purchase agreement. It is trite that a notice does not have to contain the exact words stipulated in cl 9.2 to constitute a notice that Intrared should rectify its breach. The effect of Deepak's undated letter is precisely that. Accordingly it is not tenable to maintain, in the face of this letter and the events surrounding Intrared's letter of 31 January 2011 that the plaintiffs simply remained silent or condoned the breach, thereby waiving their rights for remedy against such breach. As for the cases relied upon by Intrared, while they correctly set out the position in relation to waiver, it is clear from the factual matrix of this case that it is not possible to infer that Deepak had 'abandoned' or forsaken his right and entitlement to be paid under the agreement. Such a conclusion would be absurd/illogical, given the consequences of the failure of Intrared and KFH halting payments due under the agreement.

[88] Further and in any event, cl 10.4 of the share sale and purchase agreement provides expressly for waiver and stipulates that the waiver of any breach of the agreement must be in writing and signed by or on behalf of the party granting the waiver. Clause 10.4.2 further stipulates that a breach is not waived by any failure or delay by the other party in exercising or partial exercise of any right under the agreement. In short these contractual provisions are clear and unequivocal that waiver has to be in writing and that the failure or delay to exercise any rights is not a waiver.

[89] Intrared's contention that the plaintiffs through Deepak did nothing for a period of three months is therefore insufficient to amount to waiver under the agreement. More importantly given the clear stance taken by the plaintiffs vide

their undated letter in response to Intrared's letter of 31 January 2011, it cannot be concluded that the plaintiffs merely folded their hands and did nothing as appears to be suggested by Intrared.

[90] The fact that Deepak sought to remedy matters by seeking to arrange a meeting with Glomac notwithstanding the fact that he was under no duty to do so, does not and cannot amount to conduct establishing waiver or estoppel. Waiver requires conduct abandoning a right. By seeking a meeting with Glomac to deal with the development order, Deepak was seeking to remedy matters for the benefit of Intrared. How this amounts to an abandonment of the plaintiffs' rights in the face of Intrared's breach is unexplained by Intrared. The fact that the plaintiffs sought to assist Intrared in respect of Prestige Scale Sdn Bhd's contract with Glomac in no way impinges upon, or abrogates or negates or waives Intrared's obligation to pay the plaintiffs under the share sale and purchase agreement.

[91] Intrared's evidence through its key witness, DW1 further bears the foregoing out:

Q: In your witness statement, you have said in essence that the plaintiffs by their conduct had acknowledged and accepted… So you are saying here that the plaintiffs had agreed to the suspension?

A: The impression that the plaintiffs agreed

Q: Did they communicate such agreement by letter to you that they were agreeing to your suspension of payments?

A: No

Q: Can I refer you to the response/letter from the plaintiffs to your letter of suspension? First was the undated letter you referred to. This is to be found at CBD-3 at page 57. Look at the last paragraph. So were they agreeing to the suspension of payments?

A: In this letter, no.

Q: So is there any letter where they said yes they agree?

A: The other letter that the plaintiff has sent to us that gave us the impression is the letter on 28 February that agree for meetings to be held

Q: Let's go to that letter of 28 February letter, this is at page 16. Let me read it to you very quickly. Is there anywhere in that letter that says they agree to the suspension?

A: No

[92] Turning to the all important letter of 28 February 2011 that Intrared submits amounts to evidence of waiver, it is clear upon a perusal of the same that the letter is not even issued to Intrared. It is issued to Glomac Al Batha Sdn

Bhd. In the letter, Deepak merely sets out the fact of para 47 of the development order and asks to have a meeting with Intrared and the plaintiffs in order to address the issues raised by Intrared within the week. This begs the question of how such a request made to a third party for the benefit of Intrared, can amount to a waiver of the breach of contract committed by Intrared in refusing deliberately to honour its commitment under the share sale and purchase agreement. Assisting Intrared to deal with a problem that is unrelated to the share sale and purchase agreement and to which the plaintiffs are not privy, cannot form a factual matrix sufficient to establish either waiver or estoppels. This is because it cannot be said that the plaintiffs have either abandoned any right or acted in a manner that is contrary to the lawful enforcement of their rights under the share sale and purchase agreement. At no time can it be said from the plaintiffs' conduct that they had acquiesced to or accepted the breach by Intrared of the terms of the agreement. On the contrary the plaintiffs insisted that Intrared honour its obligations thereunder. The fact that the plaintiffs were prepared to assist Intrared to resolve its dispute with Glomac so as to facilitate the payment of monies due under the share sale and purchase agreement shows that the plaintiffs were prepared to take all necessary steps to ensure that the terms of the share sale and purchase agreement were honoured. That cannot amount to a waiver or condonation of Intrared's breach.

[93] Intrared submits that the plaintiffs did not insist on their strict legal rights. They further submit that Deepak ought not to have helped Intrared because they had already assigned payments to Bank Rakyat. They also point to the fact that Deepak remained 'idle' to conclude that 'Deepak knew he was at fault'. That he knew about condition 47 before the share sale and purchase agreement was signed.

[94] These submissions by Intrared appear to this court to be completely misconceived. Whether Deepak knew or did not know of condition 47 is immaterial. What is clear from the evidence is that Intrared's own solicitors, Messrs Mohd Ridza, were well aware of the development order and accordingly are deemed to have knowledge of its contents. Intrared's agents therefore had all the requisite basis to ascertain the full facts pertaining to the building long before the execution of the share sale and purchase agreement.Therefore Intrared cannot now seek to speak of Deepak's 'guilt' or knowledge in an attempt to create a factual matrix to support a case of estoppel or waiver. In any event such a factual matrix fails to establish any case of estoppel or waiver.

[95] Having considered the evidence in its entirety I am satisfied that there is no basis for the claims of waiver, estoppel and election variously put forward by Intrared. While the propositions of law put forward are accurate the factual matrix and chronology of events comprising the salient facts of this case do not

allow or warrant the inference of either waiver, estoppel or election on the part of the plaintiffs such that they are deprived of the lawful remedies available to them by reason of Intrared's wrongful breach of contract. The defence of estoppel or waiver or an abandonment of rights therefore fails. It follows therefore that the plaintiffs are entitled to be compensated for all losses and damage suffered as a consequence of Intrared's breach of contract.

[96] Before dealing with the issue of loss and damage arising from breach of contract, I shall first consider whether the plaintiffs succeeded in establishing their cause of action founded in conspiracy to injure.

Are Intrared and KFH liable for the tort of conspiracy to injure the plaintiffs by causing the plaintiffs to suffer economic loss as a consequence of Intrared's and KFH's breach of the share sale and purchase agreement and the irrevocable letter of undertaking respectively, which led directly to the plaintiffs defaulting under their repayment terms with Bank Rakyat?

The law relating to conspiracy

[97] In their pleadings the plaintiffs do not specify with clarity whether their cause of action in conspiracy levelled against KFH and Intrared is premised on lawful means conspiracy or unlawful means conspiracy. They do plead that the predominant purpose of the conspiracy was to cause injury to the plaintiffs. That in itself does not mean however that the cause of action is premised on lawful means conspiracy. The fact that the conspiracy centres around a breach of contract by both KFH and Intrared allows for the claim to be premised on unlawful means conspiracy. Before considering the pleadings and evidence further it is relevant to consider the law relating to conspiracy at this stage.

[98] In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2010] 5 CLJ 32 the Court of Appeal in dealing with the law relating to conspiracy stated as follows:

> [32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar; and
>
> (d) damage is an essential element where damage is not pleaded the statement of claim may be struck out.

(see *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (rep) 243 (HC)

> [33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo Project.
>
> [34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement (see also *Tiarasetia Sdn Bhd v Yaysan Selangor & Anor* [2010] 6 CLJ 830 and *Pengurusan Danaharta Nasional Bhd & 2 Ors v Tan Sri Dato' Tajuddin Ramli (No 3)* [2009] 1 LNS 1641).

[99] In *SCK Group Bhd v Sunny Liew Siew Pang* [2011] 4 MLJ 393; [2010] 9 CLJ 389 the Court of Appeal held that:

> In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:
>
> (1) an agreement between two or more persons;
>
> (2) for the purpose of injuring the plaintiffs; and
>
> (3) acts done in execution of that agreement resulted in damage to the plaintiff

Conspiracy

[100] The constituents of the tort of unlawful means conspiracy were authoritatively stated in the English Court of Appeal case of *Kuwait Oil Tanker Co SAK and another v Al Bader* [2000] 2 All ER (Comm) 271 where Nourse LJ defined the scope of this economic tort as follows:

> … It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as conspiracy to injure and the second as a conspiracy to use unlawful means: see eg *Clerk & Lindsell on Torts*, (17th Ed), paras 23–76. In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the

claimant, injury to the claimant need not be his predominant intention. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows:-

> A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

We shall call them a 'lawful means conspiracy' and an 'unlawful means conspiracy' respectively.

Those principles seem to us to be consistent with the authorities, including in particular *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 and *Lonrho plc v Fayed* [1992] 1 AC 448 which analyse the leading cases. See also for example *Rookes v Baranard* [1964] AC 1129; [1964] 1 All ER 367 where (at p 1209) Lord Devlin drew a clear distinction between the two types of conspiracy. It is important to note that the tort of conspiracy to injure by unlawful means is different in significant respects both from the crime of conspiracy and from the law of contract. A criminal conspiracy is in essence an agreement to commit a crime and, as such, is complete when the agreement is made, whether or not it is carried out. For this reason care must be taken in considering decisions in criminal cases where (as here) the question is whether the tort of conspiracy was committed. Lord Diplock put it in this way in *Lonrho v Shell* (at p 188):

> regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff, so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to an agreement.

In that passage Lord Diplock appears to have been referring to both types of conspiracy. The essence of the unlawful means conspiracy is injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury. It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination.

A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at p 124, it is not necessary to show that there is anything in the nature of an express agreement whether formal or informal. It is sufficient if two or more persons combine with a common intention, or in other words that they deliberately combine, albeit tacitly to achieve a common end. Although civil and criminal conspiracies have important differences, we agree

with the judge that the following passage from the judgment of the Court of Appeal criminal Division delivered by O' Connor LJ in *R v Siracusa* (1990) 90 Cr App Rep 340 is of assistance in this context:

> *Secondly the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive*. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. *Consent, that is agreement or adherence to the agreement can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity*.

Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of …

In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself … (Emphasis added.)

[101] The established/acknowledged series of cases which have defined the salient characteristics of the law of conspiracy may be summarised as follows:

> The tort of conspiracy to injure is delineated into two categories, namely 'unlawful means' conspiracy and 'lawful means' conspiracy. The label 'unlawful' signifies that unlawful means comprise an element in the cause of action. However, central to this tort, albeit 'unlawful' or 'lawful' means conspiracy, is the continuing requirement of a demonstration of an intent by the defendant to injure the claimant. In 'lawful' means conspiracy the requirement is that such intent be predominant in the mind of the defendant whereas in 'unlawful means' conspiracy that requirement is replaced by the requirement to show that unlawful conduct has been the means of the intentional infliction of harm to the claimant.

[102] This proposition was laid down by the House of Lords in *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173 and reaffirmed in *Lonrho plc v Fayed* [1992] 1 AC 448 and also in the more recent case of *OBG Ltd v Allan* [2008] 1 AC 1 where Lord Nicholls stated at pp 57–58:

> I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's

business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.

165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.

166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant.

167. I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the reverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in *Sorrel v Smith* [1925] AC 700, 742:

> When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.

[103] To the same effect Lord Hoffmann said this, at p 30:

> … people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves …
>
> 43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to be intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at'.

[104] Lord Hoffman also stated later on in the judgment (at p 35) that:

62. Finally, there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.

[105] The OBG case is not in terms a case about conspiracy, but rather about the closely related torts of inducing a breach of contract, and causing loss by unlawful means. Nonetheless, the dicta about intent to injure as referred to above was treated as fully applicable to conspiracy to injure by unlawful means, in *Meretz Investments NV v ACP Ltd* [2008] Ch 244, by the Court of Appeal.

The plaintiffs' pleaded cause of action in conspiracy

[106] In their statement of claim, the plaintiffs contend that Intrared and KFH had conspired between themselves with the predominant purpose of injuring the plaintiffs' economic interest by procuring a breach of the share sale and purchase agreement and the irrevocable letter of undertaking as a consequence of which the plaintiffs directly suffered loss and damage when their loan facility afforded by Bank Rakyat went into default.

[107] The plaintiffs contend that by agreement between the parties, Intrared and KFH, in or around January 2011, payments due under the share sale and purchase agreement and directly by KFH under the letter of undertaking were withheld. As a consequence of such withholding or suspension for the months of January 2011 until April 2011, the repayment obligations of the plaintiffs owed to their bankers, Bank Rakyat were breached. In other words the net result of the suspension was that the plaintiff defaulted on the repayment of the loan facilities due to Bank Rakyat.

[108] The plaintiffs further pleaded that Intrared and KFH had actual knowledge of the subsistence of the facilities and more significantly that withholding payments would cause the plaintiffs to be in default. Finally the plaintiffs maintain that Intrared and KFH withheld the payments due to Bank Rakyat as they were aware that in the ordinary course of events such deault would cause the plaintiffs to be listed on a defaulter's list or Central Credit Risk Information System ('CCRISS'). Finally the plaintiffs plead that the agreement above was executed resulting in loss and damage to the plaintiffs.

[109] Intrared wholly denies the existence of any such agreement between itself and KFH to suspend payments with the intention of causing harm to the plaintiffs economic interests. Intrared maintains that the plaintiffs have not established a logical reason why it and KFH would even venture to conspire to injure the plaintiffs economic interest.

[110] Intrared also points to the fact that KFH is not a party to this suit, as the suit was discontinued against KFH in or around November 2011. It therefore maintains that the allegation of a conspiracy cannot stand when one of the two parties to the alleged conspiracy is no longer a party to the suit, maintaining that the substratum of the claim has disappeared with the discontinuance of the suit against KFH.

[111] Prior to considering the entirety of the merits it is necessary to ascertain whether the plaintiff has indeed succeeded in establishing or discharging the onus on it of satisfying or proving the various elements of the tort of conspiracy, albeit lawful means or unlawful means conspiracy.

Is there evidence to substantiate the tort of conspiracy?

[112] As stated at the outset in relation to the law, the first element that has to be established is the existence of an agreement between the conspirators, namely Intrared and KFH, or a combination of action or concerted action between Intrared and another person or persons to injure the plaintiffs (see *Kuwait Oil Tanker Company SAK v Al-Bader and others*). As also stated in that case, it is not necessary to show anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or that they deliberately combine, albeit tacitly to achieve a common end. How then is this to be ascertained? As stated in *R v Siracusa* the existence of such an agreement or combination of action with a common purpose can only be inferred from overt acts.

[113] This begs the question: are there any overt acts from which it can be inferred that Intrared and KFH acted in concert or combination deliberately so as to achieve a common end, that end being detriment or damage to the plaintiff's economic interests.

[114] The starting point must be the fact of Intrared and KFH acting in combination or jointly to halt or cease all payments due under separate contractual obligations to third parties (Bank Rakyat) which directly affected the plaintiffs. In other words, I refer to the fact that Intrared took a decision not to honour its obligations under the Share sale and purchase agreement in January 2011. KFH, in terms of timing, also took a decision not to honour its obligations under the separate irrevocable letter of undertaking issued to the

plaintiffs. The fact that both entities determined at the same time not to honour their separate obligations under two different contracts evidences to my mind, concerted action or an agreement or a combination of action by two parties. The fact that their actions affected one common 'target' namely the economic interests of the plaintiffs also cannot be denied. When viewed in totality therefore the acts of Intrared and KFH, to cease payments under their separate contracts amount to overt acts from which it may be inferred that:

(a) the two entities acted together pursuant to an agreement or in combination or in concert; and

(b) with the common purpose of giving rise to a breach or default in two separate contracts with the plaintiffs, the net effect of which would be to cause detriment to the plaintiffs.

[115] Intrared and KFH, as they have contended throughout the trial, are two separate entities in law which function for all intents and purposes under company law, as separate entities, notwithstanding that they share common directors and notwithstanding that Intrared, was incorporated primarily to manage and control KFH's real property interests.

[116] As has been explained in some length at the outset Intrared was bound, under the express terms of the share sale and purchase agreement to make payments in accordance with Schedule 2 of the said agreement. A perusal of Schedule 2 discloses that repayment instalments were timed to coincide with the developer's construction of the building. As of January 2011 several repayment instalments remained potentially payable over time under the agreement. It is not in dispute that Intrared unilaterally took a decision to halt all further repayments, a decision which it communicated to the plaintiffs as of 31 January 2011.

[117] As for KFH vide the terms of the irrevocable letter of undertaking dated 31 December 2008, it, as a banking institution undertook as follows:

> … In compliance with clause 4.2(c) of the Share Sale Agreement, we Kuwait Finance House (Malaysia) Berhad, at the request of our client Reetaj City Centre Sdn. Bhd., hereby irrevocably and unconditionally undertake to pay to you or your assignee, namely Bank Kerjasama Rakyat Malaysia Berhad ('BKRM') the remainder of the Balance Purchase Consideration not exceeding Ringgit Malaysia Forty Million (RM40,000,000-00) ('Undertaking Amount') in accordance with item 3 of the schedule of payment set out in Schedule 2 of the Share Sale Agreement
>
> We undertake to pay to you or to your assignee, namely BKRM, as the case may be, the Undertaking Amount according to you or your assignee namely BKRM's instructions within seven (7) Business Days from our client's receipt of the developer's notice referred to in Schedule 2 of the Share Sale Agreement.

[118] A perusal and construction of the salient clauses of this irrevocable letter of undertaking make it clear that:

(a) KFH irrevocably and unconditionally undertook to pay the plaintiffs or Bank Rakyat the balance purchase consideration of RM40m in accordance with the schedule of payment as prescribed in Schedule 2 of the share sale agreement; and

(b) KFH undertook to pay the plaintiffs or Bank Rakyat the said sum of RM40m according to the instructions of the plaintiffs or BKRM within seven days of Intrared's receipt of the developer's notice (ie Glomac's notice) referred to in Schedule 2 of the share sale agreement.

[119] It follows from the foregoing that KFH as a banking and financial institution gave what in effect was an irrevocable guarantee or promise to pay the balance purchase consideration to the plaintiffs or Bank Rakyat within seven days of Intrared receiving Glomac's notice in accordance with Schedule 2 of the share sale and purchase agreement. The trigger for such payment by KFH was therefore determined by ascertaining when Intrared received the developer's notice as per Schedule 2.

[120] KFH's CEO, one Dato' Jamelah Jamaluddin, ('PW2') suggested to the contrary in her examination-in-chief. She testified that KFH did not make payment because Intrared did not make a request for such a drawdown. This is what she said:

Q: Why is it that KFH Malaysia did not make payment in accordance with the irrevocable letter of undertaking dated 31 December 2008?

A: Yes we gave an irrevocable letter of undertaking, but, there must be something that triggers that payment, right? There must be a notice to us. When there is no such notice How could we make payment?

Q: Would you agree with me that the terms of the irrevocable letter of undertaking must be as stated in the letter of undertaking? That's what they have undertaken to pay.

A: Yes

…

[121] And further on in her testimony:

Q: Do you agree that the trigger for payment as stated in the letter of undertaking here at paragraph 4, page 118. It says here 'within 7 Business Days from our client's receipt of the developers notice referred to in Schedule 2 of the Share Sale Agreement'. That's the trigger of your irrevocability?

A: And our client is referred to as?

Q: Intrared. Is there any suggestion that they never received the developer's notice?

A: I wouldn't know

Q: You wouldn't know? But, is that your position or the Bank's position that it did not make payment for those three months? They suspended payments.

A: We did not suspend any payment. We just did not make any drawdown because there is no notice.

Q: You did not make any drawdown?

A: Because there is no request. And further on in her evidence:-

Q: I'm bound to put it to you that the bank had adopted a course in not paying according to the irrevocable letter of undertaking because they had agreed with Intrared not to make payment.

A: No. This is not true. If there is a notice for us to pay, we will definitely pay.

[122] It is clear from PW2's evidence that her contention was that as far as she and KFH were concerned, there was no duty or obligation on the part of KFH to make payment under the irrevocable letter of undertaking of 31 December 2008 issued by KFH to the plaintiffs unless and until Intrared instructed KFH to do so. The rationale appeared to be that Intrared, as KFH's client, had to advise KFH to make the drawdown or payment, failing which no payment would ensue as there was no obligation to do so.

[123] This stance however appears to run awry of the clear and express wording of the irrevocable letter of undertaking as set out above. It is clear, as I have construed the document above, that KFH gave an express promise, which could not be revoked, to pay the balance purchase consideration to the plaintiffs or their assignee, Bank Rakyat within seven days of Intrared's receipt of the relevant developer's notice pursuant to Schedule 2 of the share sale and purchase agreement. In other words, by virtue of the express words in this irrevocable letter of undertaking, upon Intrared receiving the developer's notice there arose a corresponding and immediate obligation on the part of KFH to make the requisite payment of the relevant purchase consideration instalment.

[124] Such an obligation arose on the part of KFH, whether or not Intrared wrote to it or advised it orally to make a 'drawdown'. There is nothing in the irrevocable letter of undertaking that makes reference to a need for Intrared to advise or instruct KFH, after which the payment is to be made. The wording of the letter of undertaking is such that the obligation on the part of KFH arises immediately and automatically within the seven day period from which Intrared receives the requisite notice. The fact that Intrared does not advise

KFH of the receipt of such notice is no excuse for the failure to pay as KFH's obligation arises independently of any such notice.

[125] In any event in the instant case, it is not in dispute that the developer's notice was dated 28 January 2011 and 29 April 2011. KFH's obligation to pay under the irrevocable letter of undertaking therefore became due seven days after those dates.

[126] Mr Abdul Jabar bin Abdul Rahman, ('PW4') who was previously the acting CEO of KFH, confirmed in the course of his testimony that it was KFH's practice to honour an irrevocable letter of undertaking:

> Q: What was the practice of KFH in respect of irrevocable letters of undertaking that they gave at that time? Will they honour/comply with such letters/terms when you were there as the acting CEO?
>
> A: As far as I can remember, we would not normally go back on our words. If we give an irrevocable undertaking to a customer, we will comply to it.

[127] This accords with accepted standards of banking practice. I am therefore unable to accept as tenable, given the documentary evidence above, PW2's oral testimony and apparent comprehension of the irrevocable letter of undertaking to the effect that KFH did not pay because it did not receive a drawdown notice from Intrared instructing it to pay. Her evidence on this aspect was less than reliable.

[128] The irrevocable letter of undertaking created a direct and separate liability or obligation due from KFH directly to the plaintiffs or its assignees which KFH failed to honour. The fact that KFH is a sizeable banking institution which ought to be appraised of its duties and obligations under a relatively common financial instrument such as an irrevocable letter of undertaking lends weight to the inference that the failure to honour the irrevocable letter of undertaking was in fact the product or consequence of a deliberate decision taken in conjunction with, or in combination with Intrared, its subsidiary and client. In other words, for a banking institution to renege on its contracted obligation under a financial instrument which is expressly worded virtually as a guarantee, warrants an inference that KFH's decision not to honour the same could only have been a deliberate decision. The fact that it concurred with Intrared's decision not to pay under the share sale and purchase agreement can hardly, given the timing, be attributed to co-incidence. This too points to a joint and deliberate action on the part of these entities.

Intrared's action in halting payments under the share sale and purchase agreement

[129] The events leading up to Intrared advising the plaintiffs on 28 January

2011 that it would no longer be making payments due under the share sale and purchase agreement until the issue of para 47 of the development order was resolved has been set out at length in relation to the issue of a breach of contract. The issue that rises to the fore in relation to Intrared's action is this: what did or could Intrared hope to gain by ceasing or halting or suspending payments under the agreement?

[130] It is trite that the only parties privy to the share sale and purchase agreement were Intrared and the plaintiffs. By refusing to pay the balance purchase price the only party that would or could suffer detriment would be the plaintiffs. Intrared was in the position of having already acquired the entire shareholding in Prestige Scale Sdn Bhd notwithstanding that the entire purchase price had not been paid. The share sale and purchase agreement had been structured that way.

[131] More significantly the question that arises is how could Intrared or indeed Prestige Scale Sdn Bhd improve its position in relation to para 47 of the development order by ceasing or halting all payments due under a different and separate agreement between the plaintiffs and Intrared? What possible gain or advantage could Intrared secure vis a vis Prestige Scale Sdn Bhd (which it now owned wholly) and Glomac?

[132] Could the cessation of payments due to the plaintiffs by Intrared under the share sale and purchase agreement remove or vary or deal in any manner whatsoever with the obstacle created by para 47 of the development order which prohibited any parties from utilising the building as office premises save for Glomac and its subsidiaries? It is in fact patently clear that the obstacle posed by para 47 could only be dealt with by negotiations held with Glomac and the Dewan Bandaraya Kuala Lumpur which had imposed such a condition in the first place. The plaintiffs were neither placed to deal with, nor responsible for the subsistence of para 47 in the development order.

[133] To therefore respond in such a manner to what in effect could have amounted to a breach of the sale and purchase agreement between Glomac and Prestige Scale Sdn Bhd was entirely unwarranted and unjustified. This gave rise to a clear finding of a breach of contract as I have concluded earlier. In point of fact, an option open to Intrared if it found condition 47 unworkable was to give notice to Glomac of its intention to, and to proceed to terminate the sale and purchase contract for fundamental breach on the grounds that, the 'fundamental substratum' of the agreement had been eroded in that it could no longer house itself and its holding company KFH in the building. This however Intrared did not do. It simply halted payments due to Glomac as well

as the plaintiffs. While the cessation of payments to Glomac may at least be justified on the grounds above, the halting or suspension of payments to the plaintiffs is unwarranted.

[134] Learned counsel for Intrared and more vociferously, learned counsel for Prestige Scale Sdn Bhd, have submitted that Intrared was entirely entitled to stop all payments under the share sale and purchase agreement because, it is alleged, the entire substratum of the agreement was frustrated. However this submission fails to take into consideration the following matters:

(a) the subsistence of the development order was known by Intrared's solicitors and accordingly by Intrared well before January 2011. Correspondence pertaining to the same was exchanged as referred to above in relation to the issue of breach of contract;

(b) a due diligence exercise was undertaken by Intrared's solicitors prior to the entry into and execution of the share sale and purchase agreement. Intrared is therefore bound to have full knowledge of the contents of the development order, particularly para 47 when it entered into the agreement;

(c) at trial the evidence of PW1, PW3 and the documentary evidence clearly discloses that Intrared was involved in and participated in the project relating to the purchase of the building when the plaintiffs were still the shareholders of Prestige Scale Sdn Bhd, quite closely. They knew or ought to have known of the existence of the development order;

(d) even if it is true that Intrared only realised the full implications of the contents of the development order, particularly para 47 in January 2011, it is bound or deemed by reason of the due diligence exercise and the correspondence between its solicitors and the plaintiffs' solicitors to have consented to and accepted that condition upon entry into the share sale and purchase agreement. Intrared's recourse ought to have been against its solicitors not the plaintiffs;

(e) Intrared and Prestige Scale Sdn Bhd in the course of cross-examining PW1, Deepak, sought to suggest that Deepak had knowledge of the development order and para 47 and that he was therefore 'guilty' of some heinous wrongdoing as Intrared has stated in the course of its submissions. Such antagonism is somewhat unwarranted. It cannot be said that KFH, as a sizeble banking institution, and its subsidiary, Intrared, were 'tricked' into entering into the share sale and purchase agreement. They were privy to the purchase by Prestige Scale Sdn Bhd of the building from its inception and were at all times full advised by qualified legal personnel;

(f) for these reasons the response of Intrared, to the subsistence of para 47, against the plaintiffs is inexplicable in that it fails to assuage or remedy the

problem faced by Intrared and KFH. However it has the effect of directly injuring the plaintiffs' economic interests in that such cesser of payment caused the plaintiffs to default in their banking obligations to Bank Rakyat; and

(g) considering therefore the entirety of the response of Intrared and KFH it can only be concluded that these two entities, which had undertaken disparate and binding contractual obligations under the agreement and the letter of undertaking chose to renege on the same, in concert or in combination, with the net calculated result of causing injury to the plaintiffs.

Intrared and KFH

[135] I am further fortified in my conclusion about the joint and deliberate action of KFH and Intrared, warranting the inference that these entities acted in combination or in concert, by the close relationship between these two separate entities.

[136] Intrared was a company incorporated by KFH for the purposes of comprising the investment and property management company of KFH. In so far as the building was concerned, Intrared was the subsidiary incorporated by KFH for the purposes of the acquisition of the plaintiffs' shareholding in Prestige Scale Sdn Bhd. Intrared was incorporated on 19 June 2008 under the original name of KFH Reetaj Sdn Bhd. The initial shareholders were one Dr Radzuan Rahman, a director of KFH and one Dato' CK Wong, ('PW3') a nominee for KFH. They each held one share respectively.

[137] PW3 testified that he was approached by KFH to head a real estate investment and property management company which KFH then in 2007, wanted to form to look after its property interests as well as clients' interests. He also testified that he was at the inception a nominee for KFH, holding 65 out of 98 shares on trust for KFH. He further explained that this proportion of shareholding was allocated to him to hold on trust for KFH in order to effectively circumvent Bank Negara Rules which did not allow a foreign bank in Malaysia to hold more than 20% of a Malaysian asset like an office building. To further substantiate his evidence, PW3 produced a declaration of trust which confirmed this position.

[138] PW2 also confirmed that Intrared was incorporated to manage KFH's real property interests but was unable to confirm the nominee relationship between PW3 and the bank. It is relevant that PW3 is no longer a nominee for KFH the shareholding of Intrared having altered. The point of the foregoing

however is that the two initial shareholders were nominees for KFH which meant that Intrared was effectively controlled by KFH.

[139] A perusal of the shareholding of Intrared today still shows that KFH and Intrared share a common director, namely one Shaheen HA Alghanem who is now the Deputy Chairman of KFH and an Executive Director of KFH Kuwait. The other directors of Intrared now are one AN Alghannam, the Head of Real Estate in KFH Kuwait, Mohamed Ridza bin Mohamed Abdulla, the lawyer whose firm conducted the due diligence for the share sale and purchase agreement and one Mohammad Jalal Uddin Mohammad Abdul Jabar an employee of KFH Kuwait Real Estate, a nominee of GRE Investment Ltd. The shareholding of Intrared is now 19% owned by KFH while 81% is owned by GRE Investment Ltd. This latter company is also a part of the KFH group, as confirmed by PW2 in the course of her testimony. She described GRE as a vehicle of KFH Kuwait. Additionally it is to be noted that KFH Malaysia is 100% owned by KFH Kuwait.

[140] In any event, DW1 also confirmed that the board of directors of Intrared were aware of the decision to suspend payments, although he maintained that he made the decision on legal advice. The letter advising of the cessation of payments was signed by Jalal Uddin, one of the directors above of Intrared.

[141] The salient point to be noted from the foregoing is that given the close relationship between KFH and Intrared as associate companies, it is not inconceivable that they did collaborate or concur in taking the deliberate step of reneging on their contractual obligations simultaneously under the share sale and purchase agreement as well as the irrevocable letter of undertaking.

Knowledge of the plaintiffs' term loan with Bank Rakyat

[142] When the foregoing facts, namely the deliberate and joint acts of the two entities, Intrared and KFH under the share sale and purchase agreement and the irrevocable letter of undertaking is considered in conjunction with the undisputed fact that both entities were fully aware of the plaintiffs' term loan repayment obligations to Bank Rakyat, it becomes more evident that Intrared and KFH could not but be aware of the consequences of their action in ceasing to honour all payments they had contracted to make to Bank Rakyat on behalf of the plaintiffs under the deed of assignment and irrevocable letter of undertaking. PW2 confirmed that KFH was aware of the arrangements in respect of the plaintiffs' loan facility with Bank Rakyat.

[143] It follows from the foregoing that Intrared and KFH were aware that when they halted repayments to Bank Rakyat, there would be an ensuing

default on the part of the plaintiffs in respect of their repayment obligations vis a vis Bank Rakyat. This in turn would have dire consequences to the plaintiffs' economic interests given the size of the Bank Rakyat loan which was in the region of RM40m. In this context the background of the relationship between KFH and the plaintiffs is significant in that the plaintiffs were, prior to the deterioration of the relationship between the plaintiffs and KFH, KFH's single largest customer. A considerable amount of the plaintiffs' business was conducted through or with the support of KFH's financing. As PW2 readily conceded, KFH was cognisant of the plaintiffs' considerable earnings through the various entities it had set up for a diverse series of businesses, including Reliance Pillar and Radiant Splendour.

[144] Again the point to be noted is that this was not a one-off banking transaction between a first time customer and an established bank. The parties here, particularly the plaintiffs through Deepak and KFH enjoyed a considerably closer relationship, the net consequence of which was that KFH and thereby Intrared were at all material times cognisant of the plaintiffs' business interests. With the shifting of the plaintiffs' financing facilities to Bank Rakyat, a matter in which both KFH and Intrared were intricately involved, they could not but be fully aware of the consequences of their concerted action of ceasing all payments in contravention of their contractual obligations.

[145] It is pertinent that if indeed Intrared was so affronted by the subsistence of para 47 (which it ought in any event have been fully appraised of, given the knowledge of its lawyers) it could have terminated the share sale and purchase agreement with the plaintiffs and sought a refund of all monies paid, on the grounds, as it now contends, that the 'substratum' of the agreement had disappeared. This it did not do. Neither did it take the course of stipulating that the failure on the part of the plaintiffs' to highlight the existence of para 47 amounted to a breach as far as they were concerned, but that they would continue with the share sale and purchase agreement but reserve their rights to seek damages from the plaintiffs for loss suffered thereby. They did not take either course but instead chose to halt or suspend their contractual obligations which in no way assisted their position vis a vis the obstacle posed by para 47 of the development order.

Did Intrared and KFH possess the requisite intention to cause injury to the plaintiffs?

[146] At the outset of dealing with this cause of action founded in conspiracy I stated that it was unclear from the pleadings whether the plaintiffs were alleging, lawful means conspiracy or unlawful means conspiracy as they did not specifically alluded to either. However they did plead that the chief or predominant purpose of the conspiracy between Intrared, the defendant and

KFH was to injure the plaintiffs' economic interest. While this appears to suggest lawful means conspiracy, the fact that the act of the 'conspirators' in breaching their contractual obligations which I had earlier found to amount to a breach of contract, render the means utilised by Intrared and KFH, unlawful. In other words the fact that the means of conspiring so as to injure the plaintiffs' economic interests was unlawful, in that it amounted to a breach of contract, appears to warrant the categorisation of this conduct as unlawful means conspiracy.

[147] As stated at the outset in relation to the law in this area, particularly in *OBG v Allan* per Lord Nicholls, a key ingredient of this tort that must be established, be it lawful or unlawful means conspiracy is intent. The evidence must show that the defendant, ie Intrared intended to harm the claimant.

[148] Applying the passage in *OBG v Allan*, more particularly Lord Nicholls' speech on what comprises the requisite 'intention', to the factual matrix of this case, it follows that it is incumbent upon the plaintiffs to show that Intrared intended to harm the plaintiffs' economic interests either as an end in itself, or as a means to an end. An example of this was given in Lord Nicholls' speech where he gave the example of one party holding a grudge against the other. Applied to the current matrix that would require a consideration of whether Intrared had a grudge against the plaintiffs, and therefore chose to halt payments due, knowing that it would harm the plaintiffs economically.

[149] That indeed is the case here. The evidence discloses that Intrared appeared in its correspondence to hold a grudge and fault Deepak for the subsistence of para 47 and for allegedly failing to highlight it sufficiently to Intrared. The existence of such a 'grudge' may be inferred from Intrared's conduct in breaching its obligations when in fact such breach would not, and could not in law, alleviate the problem of para 47 in any logical manner whatsoever. The decision to cease payments is only capable of one construction, namely to cause injury to the plaintiffs by causing them to default on the loan to Bank Rakyat.

[150] However Intrared and Prestige Scale Sdn Bhd both contend that the predominant purpose behind Intrared's decision to cease payments due under the deed of assignment was for 'self-interest' or 'protection of the defendants' and that this cannot therefore amount to conspiracy. Intrared gave evidence that it had 'no option' but to take this course of action. DW1 explained as follows:

> Q: Can you explain why the 3 payments were suspended?
>
> A: As I testified earlier, the whole basis in purchasing the Plaintiffs' shares in the 2nd Defendant via the SSA was to acquire the Glomac Tower. And

when someone purchases a property, he or she must be able to fully enjoy the property and deal with the property like any property owner and obtain vacant possession. This is clearly provided under the SPA.

However, in respect of Glomac Tower, there was a period of time when the Defendants were in the dark as to whether the SSA and SPA were even valid much less getting full enjoyment and vacant possession of the Glomac Tower.

Q: Can you point where it is in the SPA which provides for full enjoyment of the property as well as vacant possession?

A: This is provided in Clause 2 of the SPA whereby it essentially states that the 2nd Defendant agrees to purchase the Glomac Tower (termed as 'Property' in the SPA) free from all encumbrances and with vacant possession.

Q: So what is it that caused the uncertainty in respect of the SSA and SPA?

A: This whole incident was triggered when Glomac approached the 2nd Defendant sometime around January 2011, informing that the 2nd Defendant needed to enter into an agreement with Dewan Bandaraya Kuala Lumpur ('DBKL') in respect of the Glomac Tower food court. This was contained in a Development Order dated 22 April 2008 which DBKL had issued to Glomac who in turn extended a copy to the 2nd Defendant.

When the 2nd Defendant went through the DO, they came across Condition 47 of the DO which literally prevented anyone but Glomac or its subsidiaries from using or dealing with the Glomac Tower. The Defendants were naturally shocked as there were huge financial ramifications to both Defendants if the DO is in force.

Q: Given the seriousness of the matter why didn't the 1st Defendant get out of the contractual arrangement under the SSA?

A: Commercially the 1st Defendant had no choice but to proceed because:

(a) At that point of time, the 1st Defendant had already paid the Plaintiffs a total of RM93,685,050.40 or 79.6% of the total Purchase Price under SSA. The 2nd Defendant had already paid Glomac a total of RM346,111,890.00 or 60% of the total purchase consideration under the SPA.

(b) lf the 1st Defendant terminated the SSA, it is highly unlikely that the Plaintiffs would be in a position to repay monies already paid to them especially when the Plaintiffs had directed for the payments to be made to other parties including to settle their indebtedness to Bank Rakyat.

[151] Intrared and Prestige Scale Sdn Bhd maintain that as condition 47 of the development order was crucial and affected the whole substratum of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac, Intrared was justified in stopping payment under the share sale agreement

between the plaintiffs and Intrared, because '… it was to protect their own skin as they had already paid the Plaintiffs a total of RM93,685,050.40 or 79.6% of the total Purchase Price under the SSA, while Prestige Scale Sdn. Bhd. had paid Glomac a total of RM346,111,890.00 or 60% of the total purchase consideration'.

[152] It is immediately apparent upon a consideration of the reasons put forward by Intrared that these contentions do not justify Intrared's or KFH's breaches of the share sale and purchase agreement and the irrevocable letter of undertaking respectively. Put another way, is Intrared justified in deliberately not honouring its contractual obligations because it realised, subsequent to entry and execution of the binding contract with the plaintiffs that there was a clause in a development order with a third party, namely DBKL that it might not be able to occupy the building? Particularly when Intrared was fully cognisant of the existence of this development order? And that too after its solicitors had conducted a due diligence and approved entry and execution into the share sale and purchase agreement with the plaintiffs.

[153] There is no provision in the law that allows for one party, Intrared, to breach a binding contract with another party, ie the plaintiffs, because its wholly owned subsidiary, Prestige Scale Sdn Bhd found its contract with another party, ie Glomac, unworkable. The breach of contract by Intrared on these grounds, as I have stated before, provided no remedy in relation to the removal of para 47 of the development order, save to punish the plaintiffs for its own, ie Intrared's or its own solicitors' failure to diligently ascertain the full terms and conditions of the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac.

[154] It follows from the foregoing that DW1's evidence that it 'could not' terminate either the share sale and purchase agreement or the sale and purchase agreement simply untenable. The recourse of terminating the agreement with the plaintiffs was available to it and it is no excuse to contend that the plaintiffs were 'unlikely to be able to repay the monies'. That would have been the correct legal position to adopt, rather than effecting a breach of the share sale and purchase agreement which I reiterate could provide no remedy in relation to the sale and purchase agreement between Prestige Scale Sdn Bhd and Glomac.

[155] The cessation of instalments due to the plaintiffs certainly could not 'protect' Intrared or Prestige Scale Sdn Bhd in respect of the building. However the primary reason for the obstacle posed by para 47 of the development order was the failure of their own solicitors to sight or highlight condition or para 47 prior to executing both agreements. However Intrared chose to blame or 'punish' the plaintiffs for the error of their solicitors or themselves instead by ceasing all payments due to the plaintiffs.

[156] Therefore, the only inference as to intention to be drawn from the foregoing factual matrix is that Intrared and KFH intended to injure the plaintiffs' economic interest. This is certainly sufficient to establish conspiracy to injure albeit by lawful or unlawful means. In the instant case I have concluded that the facts disclose a conspiracy to injure by unlawful means, such unlawful means being the deliberate breach of contract by Intrared and KFH, knowing that such breach would directly cause the plaintiffs to suffer detriment in so far as their economic interests were concerned.

[157] Even if Intrared and Prestige Scale Sdn Bhd's contention that Intrared halted the payments in its own self interest and to protect itself, it would appear that the ingredient of the requisite 'intention' is still met. This follows from the passage in *OBG v Allan* by Lord Nicholls where he elaborated that a defendant usually intentionally inflicts harm on a claimant's business as a means to an end. The relevant part of the passage which has been set out above is reproduced below again for convenience:

> I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge *against* the claimant. *More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.*
>
> *165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.*
>
> …
>
> …
>
> *… Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.* (Emphasis added.)

[158] It follows from the foregoing that in the tort of conspiracy the defendant, namely Intrared in the instant case may 'intend' to harm the claimant as an end in itself where he has a grudge. This has been dealt with above. More usually however it was pointed out that a defendant, such as Intrared and KFH in the instant case, intentionally inflict harm on a claimant's

business, such as the plaintiff's economic interests, as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests. However it was concluded in *OBG v Allan* that such intentional harm, albeit falling within the first or second category was sufficient to satisfy the mental ingredient of this tort. In other words, even if it is accepted that Intrared deliberately ceased honouring its contractual obligations to protect or promote its own economic interests, this would be sufficient to satisfy the mental ingredient or 'intention' required for this tort.

[159] In so saying I am cognisant of the fact that prior to satisfying this ingredient of 'intention' for this tort, a high degree of blameworthiness is called for. I have also kept in mind that 'intention' serves as the factor which justifies imposing liability on Intrared for loss caused by its actions. It is clear from the lengthy passages preceding this passage that I have concluded that Intrared's actions were clearly deliberate. It is clear to this court that Intrared and KFH intended to injure the plaintiffs. This is not a case where Intrared and KFH merely had foresight that their unlawful conduct may or might have or would probably injure the plaintiffs. Again I am able to come to this conclusion because there is no logical or reasonable basis to explain how or why such cessation or suspension would remedy an obstacle in a separate contract over which the plaintiffs had no control. The fact that Intrared insists that this is the reason, and that it was for self-protection is simply untenable given the entire factual matrix of this case.

[160] Finally there is the evidence of PW2 the CEO of KFH who testified that it made no sense for KFH to injure Deepak as he and his companies had borrowed multimillions from KFH, and ruining him would not be beneficial for KFH.

> Q: It is Mr. Deepak's contention that KFH and Intrared are out to injure his economic interest. Do you agree?
>
> A: No. Why would we?
>
> A: Can you tell the Court why?
>
> A: No. If I injure him economically definitely all the facilities we granted to him will be in default.
>
> Q: Sorry. Can you slow down?
>
> A: Ok. I don't see the benefit of injuring him economically because he borrowed a lot of money from us through his other related companies so if we do that then his capability of servicing our facilities will not be there.

[161] Intrared and Prestige Scale Sdn Bhd therefore maintained on the basis of the foregoing evidence that it had to be accepted that there was no intention on the part of KFH to injure the plaintiffs economically. However if PW2's

answer is given mature consideration as opposed to being accepted at face value, it immediately becomes apparent that PW2's answer is somewhat anomalous. PW2 concedes that if the plaintiffs are injured economically then all the facilities granted by KFH to the plaintiffs would be affected adversely. However it is not in dispute that PW2 and KFH were well aware at all material times that the only effect of their ceasing to make the requisite instalment payments under the share sale and purchase agreement and the irrevocable letter of undertaking, would be to cause the plaintiffs to default in their financial obligations to Bank Rakyat, which in turn would cause a default of all their other facilities and business interests. Therefore knowing that this would be the net result, KFH nonetheless deliberately took the decision and step of ceasing all payments and refusing to honour its contractual obligations. Having done so, it cannot now, through PW2 choose to deny that it knew that its acts would cause damage to the plaintiffs. If PW2 and KFH knew this then it follows that their acts were calculated to cause damage to the plaintiffs.

[162] It was submitted that for the purposes of ascribing intention to a conspirator who is a company, it is necessary to pinpoint some person to determine whether as a matter of law the requisite 'intention' can be attributed to the corporation, such as KFH (see Belinda Ang J in the Singapore case of 'The Dolphina'). The only person who gave evidence on behalf of KFH was PW2 who was the CEO of KFH. I have earlier dealt with her evidence and explained why I found her explanations on the failure of KFH to honour its obligations under the irrevocable letter of undertaking inadequate. I have similarly rejected her evidence to the effect that KFH did not intend to injure the plaintiffs economically, for the reason that her testimony does not explain or justify KFH's actions in deliberately acting in breach of its obligations for apparently no justifiable reason other than injuring the plaintiffs. Having rejected the substratum of PW2's evidence and given the entirety of the rest of the evidence and inferences to be drawn from the conduct of both Intrared and KFH (which acts/conduct is not in dispute) I am satisfied that the requisite 'intention' for the purposes of conspiracy to injure, may be inferred from the overt acts of KFH and Intrared as well as the evidence of PW2 and DW1.

[163] In This context I must add that I am unable to accept the plaintiff's pleaded case that the 'motive' or rationale for the conspiracy was the breakdown in the relationship between Deepak and PW2 upon Dato' Jamilah being appointed CEO of KFH. There was insufficient evidential basis for such a finding. Instead it appears to this court that the primary reason for the conspiracy was the problem created by condition 47 in the development order.

Lawful or unlawful means conspiracy?

[164] I conclude for the reasons I have cited above that Intrared conspired

with another party, KFH and used unlawful means to conspire against the plaintiffs with the predominant purpose of injuring them. In unlawful means conspiracy as has been explained above, it is not necessary to establish that the predominant purpose of the conspirators was to injure the plaintiffs. In this somewhat extraordinary case however, it would appear that even this element has been made out.

[165] Even if I am incorrect and this is a case of lawful means conspiracy, then it follows from the foregoing and the factual matrix that the predominant purpose of Intrared and KFH was indeed to injure the plaintiffs' economic interests. I have at length prior to this explained how, from the evidence it is to be inferred that Intrared and KFH acted together or in combination or in concert to halt of suspend all contractual payments to the plaintiffs deliberately, with the predominant intention of injuring the plaintiffs' economic interests as they fully understood the implications on the plaintiffs' economic interests of their unlawful actions.

Can a cause of action in conspiracy subsist in the absence of KFH as a party to the action?

[166] KFH was a party to this suit when it was first filed but it is not in dispute that by reason of a supplemental agreement or settlement agreement entered into between one of the plaintiffs' companies, Premier Weaver Sdn Bhd and KFH, the plaintiffs agreed to withdraw all suits against KFH. Accordingly the plaintiffs discontinued this suit against KFH in or around November 2011.

[167] Deepak testified in the course of his evidence that 'economic duress' was applied to cause the plaintiffs to withdraw the case against KFH and PW2. I do not accept that such economic duress subsisted as the plaintiffs were duly represented at all times by solicitors and entered into the settlement voluntarily.

[168] In this context Intrared, relying on the decision of the Court of Appeal in *SCK Group Bhd v Sunny Liew Siew Pang* maintains that the plaintiffs' claim in conspiracy is unmaintainable as KFH is not a party to this action.

[169] It is to be noted however in that case that the plaintiffs there did not put forward any reason nor explanation for failing to join the co-conspirators.

[170] In the instant case, the plaintiffs did in fact provide a full explanation of why the suit against KFH had to be withdrawn, namely for purposes of

A settlement of another outstanding financial loan involving Premier Weaver. I accept that this distinguishes the instant case from the *SCK Group Bhd v Sunny Liew Siew Pang*.

B **[171]** More importantly the issue that arises for consideration is whether having resolved or withdrawn the claim against KFH, can the plaintiffs continue with this cause of action in conspiracy against Intrared?

[172] First of all it is clear as a matter of fact that the events leading up to, and C the cessation of payments under the two contracts by Intrared and KFH did take place. In other words the events giving rise to the allegation of a conspiracy did take place. That is not in dispute. What arises for consideration therefore is whether the plaintiffs have, by withdrawing the action against KFH, aborted or abandoned or released one conspirator such that the cause of action is D unsustainable. Or whether because one tortfeasor is released, the cause of action in conspiracy is extinguished.

[173] It appears to this court from even a perusal of the definition of conspiracy that it is not necessary that every co-conspirator be made a party E failing which the claimant cannot succeed. The tort is defined as being actionable where the claimant proves that he has suffered loss as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him. This in itself envisages that while the defendant is party to the action the other person or persons may not be. F That is indeed the case here.

[174] I also accept the submission of learned counsel for the plaintiff who relied on the judgment of Salmond J in *Cutler v MacPhail* [1962] 2 All ER 292 which states:

G

> … The points raised on release are extremely interesting and by no means easy. The principle is quite plain, that if there is a release of one joint tortfeasor the cause of action against all the other joint tortfeasors is extinguished; on the other hand, if there is merely an agreement not to sue one of several joint tortfeasors, the cause of action does not die and the other tortfeasors can properly be sued.

H

[175] In the instant case there was no 'release' of KFH as a joint tortfeasor in relation to the charge of conspiracy. When the action against KFH was discontinued no cause of action in conspiracy had been filed. I am aware of the I existence of the relation back theory but factually and evidentially there is no evidence of the plaintiffs having voluntarily released KFH in relation to the cause of action in conspiracy. Accordingly the settlement agreement which required the plaintiffs to discontinue the action against KFH did not have the effect of absolving or releasing KFH as a tortfeasor. The absence of KFH as a

party to the action does not therefore prohibit the plaintiffs from pursuing or succeeding in establishing this tort.

The red herrings

[176] In the course of trial considerable evidence was led on several issues which, having considered the entirety of matters, namely the causes of action and the evidence requisite to prove the same, I find to be less than relevant to matters at hand. These include:

(a) Circumvention of Bank Negara Guidelines — from the evidence of PW2 it would appear that KFH Malaysia has possibly contravened or circumvented Bank Negara guidelines by entering into a nominee arrangement with, for example, PW2 who held shares in Intrared on trust for KFH. Under the guidelines it appears that KFH ought not to hold more than 20% in Intrared. The plaintiffs sought for this court to take cognisance of KFH's 'modus operandi' as evidence that KFH is prepared to enter into nominee arrangements and 'devise' corporate structures to evade banking regulations. However this issue is not central to the primary issues that fall for adjudication here;

(b) Shaheen Al Ghanem — the plaintiffs seek that this court draw an adverse inference against the first defendant, Intrared, for failing to call Shaheen Al Ghanem. They also point to the fact that they had sought to subpoena Shaheen but were told that he was out of the country. They point to the fact that confirmation from the Malaysian Immigration Authorities disclose that he was in fact present in Malaysia two days prior to court proceedings on 18 June 2012. It appears to this court that the presence or absence of Shaheen Al Ghanem is not strictly essential for the purposes of enabling this court to make a decision on the issues before it. If the plaintiffs wished to call Shaheen as a witness it was incumbent upon them to do so well prior to trial and not during trial. The fact that they could not effect service of the subpoena on Shaheen does not automatically warrant an inference that Intrared or KFH were actively assisting to avoid his presence at court proceedings.

In so far as Intrared's defence is concerned, it is largely up to Intrared to determine who should give evidence. The fact that they chose not to call Shaheen does not warrant the drawing of an adverse inference under s 114(g) of the Evidence Act 1950 because they did produce DW1 to explain matters on behalf of Intrared.

As I have state, a considerable amount of evidence in this case is backed up by contemporaneous documents which provide a clear trail of how parties conducted themselves. The absence of Shaheen did not impede this court's ability to determine the various causes of action before it; and

(c) the issue of the allegedly 'forged' letter dated 5 June 2008 — three

different versions, namely ID3, D3 and P4A were produced in court. Even though it appears that ID3 and D3 may well be forgeries, as testified by the handwriting expert, William Pang Chan Kok ('PW5') this in itself does not have a direct or significant bearing on any of the issues arising for adjudication in this case. Ultimately it is not clear who the authors of ID3 or D3 were, save for the conclusion that the signatory, Shahrizal bin Ahmad, the second plaintiff, did not sign the same. This in no way assists or enables the court to conclude that anyone from KFH or any other third party 'forged' these letters. In short no major fact or inference turns on the fact that these letters appear to have been 'forged' largely because it is not possible to determine the identity of the party who did so. In the absence of a clear indication as to the identity of the 'forger' it is not possible to make the conclusions that the plaintiffs urge this court to make in relation to the issue of conspiracy.

Should the corporate veil of the second defendant, Prestige Scale Sdn Bhd be lifted on the grounds of the alleged unconscionable conduct of the defendants or because the justice of the case demands it if either the cause of action in breach of contract or conspiracy to injure is established by the plaintiffs?

[177] In its statement of claim at paras 40–46 the plaintiffs seek the lifting of the corporate veil vis a vis Prestige Scale Sdn Bhd, maintaining that it is merely the alter-ego of Intrared. In seeking to justify the lifting of the corporate veil they point to the following facts:

(a) Intrared acquired all the shares in Prestige Scale Sdn Bhd from the plaintiffs whereby the latter is now a wholly-owned subsidiary of the former;

(b) the board of directors of Intrared is identical to that of Prestige Scale Sdn Bhd;

(c) Prestige Scale is the vehicle used by Intrared for the purposes of acquiring, owning and ultimately disposing of the building;

(d) Intrared and Prestige Scale Sdn Bhd are the same economic entity and Intrared funded the entire purchase of the building by Prestige Scale, as a consequence of which the building is held by Prestige Scale Sdn Bhd on trust for Intrared;

(e) alternatively it is contended that by reason of Intrared's and KFH's 'unconscionable' conduct pertaining to the breach of contract and/or wilfully withholding payments under the agreement, the corporate veil of Prestige Scale Sdn Bhd ought to be lifted;

(f) the plaintiffs maintain that the 'justice of the case' demands that Prestige Scale Sdn Bhd as the alter-ego of Intrared ought to be found liable to the same degree as Intrared; and

(g) the plaintiffs point to the evidence of DW1, the general manager of Intrared, and DW2, the representative of Prestige Scale Sdn Bhd to support their contention that Prestige Scale Sdn Bhd is effectively entirely controlled by Intrared.

[178] Given the foregoing matters, the plaintiffs urge this court to lift the corporate veil and make a finding that Prestige Scale is also liable for breach of contract and conspiracy to injure, as is Intrared. The plaintiffs contend, inter alia, that the justice of the case demands that the corporate veil be lifted.

[179] It must be said that the lifting of the corporate veil is a doctrine and does not in any manner establish a cause of action. This attempt by the plaintiffs to seek the lifting of the veil is in order to ensure essentially that any remedy afforded to them in terms of damages is not rendered meaningless in the event it is found that Intrared is unable to meet such a claim.

[180] The plaintiffs' claim for a lifting of the corporate veil of Prestige Scale Sdn Bhd is vigorously contested by the company which contends that there is simply insufficient basis to warrant the grant of such drastic relief.

[181] Given the competing submissions of learned counsel for the plaintiffs and Prestige Scale Sdn Bhd which I do not intend to reproduce here, it appears that it is necessary to consider the law pertaining to the lifting of the corporate veil.

The law pertaining to the lifting of the corporate veil

[182] The approach of the Malaysian courts has been relatively varied in its exposition of the law pertaining to this doctrine. Notwithstanding this, the recent trend of the courts here has been to be wary of lifting the corporate veil too readily without sufficient evidence of control and impropriety, in keeping with the rationale adopted in the English Court of Appeal decision in *Adams v Cape Industries Plc* [1990] Ch 433.

[183] In *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72 the Court of Appeal refused to lift the corporate veil citing Professor Gower in his *Principles of Modern Company Law* (7th Ed), under the heading 'Interests of Justice':

A … Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which 'the interests of justice' have represented more than simply a way of B referring to the grounds identified above in which the veil of incorporation has been pierced.

The Court of Appeal in *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 225; [2005] 3 CLJ 355 adopted the above principle. At p 362, of the report Gopal Sri Ram JCA C stated:

In my judgment in the light of the more recent authorities such as *Adams v Cape Industries Plc* it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is D either actual fraud at common law or some inequitable or unconscionable conduct amount to fraud in equity (see also *Adams v Cape Industries Plc* [1990] Ch 433)

In another Court of Appeal case, *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd* [2011] 1 MLJ 752; [2011] 1 CLJ 491, Abdul Malik Ishak JCA stated:

E You cannot simply raise veil of incorporation just because you feel that it is in the interests of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all … Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by *Salomon*'s case. We just cannot throw out *Salomon*'s case out of the window and F pretend that it is not there. We are aware of the speech of Lord Denning MR in *Littlewoods Mail Order Stores v Inland Revenue Commissioners, Same v McGregor (Inspector of Taxes)* [1969] 1 WLR 1241, at p 1254 (CA); [1969] 3 All ER 855 at p 860 …

…

G Based on the above authorities we are of the view that this is not an appropriate case for the learned judge to lift the corporate veil and to hold the appellant liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements. There must be evidence of actual fraud or some conduct amounting to fraud in equity in order to justify lifting the corporate veil. No such case was pleaded or made H out in the present.

[184] In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529 the Federal Court dealt with the issue of the lifting of I the corporate veil and stated as follows:

… In the course of arguments, the question of 'lifting the corporate veil' which was widely canvassed in the court below was again raised. With respect, we did not see the necessity of invoking the doctrine on the particular facts and circumstances of the present case. Peeping behind the veil is to enable the court to obtain information

> on certain features of hte company for example its composition, type (holding, subsidiary etc), proportion of shareholdings, control etc. Having obtained this information, the court will examine it and then decide whether to adjudicate on the company alone or to move up the ladder of lifting the veil to more serious repercussions. In our instant case, it was an undisputed fact that the subsidiary was wholly-owned by the holding company, and it had not been challenged that the holding company, by proxy — through its nominees — managed the subsidiary. Thus, the composition, type, shareholding and control of the subsidiary stood in front of the veil and there was no need to lift the veil to unveil them …
>
> …
>
> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Aron Salomon v A Salomon & Co Ltd* [1897] AC 22. However since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases found it appropriate and necessary to depart. Thus, in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies …

[185] The Federal Court then went on to make a decision not to lift the corporate veil on the particular facts before it as it was found not to be necessary.

[186] In contrast to these cases the majority decision of the Court of Appeal in *Vellasamy Ponnusamy & Ors (on their behalf and for the 213 Sub-Purchasers of plots of land known as PN 35553, Lot 9108, Mukim Huton Melintang, Hilir Perak) v Gurbachan Singh Bagawan Singh & Ors* [2010] 5 MLJ 437; [2012] 2 CLJ 712 was to lift the corporate veil. In this case, Malik Ishak JCA and Abu Samah Nordin JCA in their majority decision determined thus:

> Reverting back to the mainstream of the present appeal, I have this to say. The registered ownership of the land to Regal is equally tainted. Regal was a shell company taken over by the first defendant and was essentially his alter ego. He took Regal specifically to transfer the land which was in his name to Regal. The first defendant was the promoter, shareholder and director of Regal. It is our judgment that the transfer of the land in the name of Regal does not break the equity of the sub-purchasers because Regal through the first defendant had full knowledge of the equitable rights of the sub-purchasers of the land.
>
> It was submitted that the veil of incorporation should be lifted in order to attribute to Regal the knowledge and notice that the first defendant possessed in regard to the sub-purchasers' rights. In *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes) Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 3 All ER 855 (CA) at p 860; [1969] 1 WLR 1241, (CA) at p 1254, Lord Denning MR had this to say:

A 'The doctrine laid down in *Salomon v Salomon & Co Ltd* [1897] AC 22 has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.

B

[187] The court went on to consider the cases of *Wallersteiner v Moir* [1974] 1 WLR 991, *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 before concluding at para 287 onwards:

C … When the courts lift the veil, it does so in order to do justice. In lifting the corporate veil, all the transactions from SEP to Regal were done with full knowledge of the sub-purchasers rights. It is always justice and justice necessitates the lifting of the corporate veil. It is wrong to say that the veil of incorporation is completely impenetrable. It is penetrable and the courts can and have on occasions pierced it and looked at the persons controlling the company. A good example would be the D case of *Jones and another v Lipman and another* [1962] 1 WLR 832 …

[188] The court then went on to consider the facts of the case and the principle that where the company in issue was found to be a device and a sham, E a 'mask which he holds before his face in an attempt to avoid recognition by the eye of equity' then the veil should be pierced. The Court of Appeal also examined the cases of *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 2 MLJ 313; [1984] 1 CLJ 325 which went up to the Privy Council where again the corporate veil was lifted on the grounds that the company in F question and another were fundamentally one entity, (see also *Re A Company* [1985] BCLC 333 where the court found that the defendant had created a network of corporations which were used as a device to prevent the plaintiffs from realising the fruits of the proceedings which the defendant had anticipated. Finally the court also cited *Sunrise Sdn Bhd v First Profile (M) Sdn* G *Bhd & Anor*.

[189] In a dissenting judgment Zainun Ali JCA (as Her Ladyship then was) held that the companies in question were separate legal entities and the H question of lifting the corporate veil did not arise since it was not the pleaded case of SPPKB that SEP was incorporated to assist it in its attempt to avoid its legal obligations to the plaintiffs. Her Ladyship also concluded that there was nothing in the evidence to show that SEP was a trustee of the land for SPPKB and by extension the sub-purchasers.

I

[190] Another relevant case would be *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97 (CA) where the court was concerned with resolving a dispute as to the true ownership of some shares. It was said:

… It has to do with a principle which lies at the heart of company law. It is that a company is a separate person from its shareholders. The latter have no interest, legal or beneficial over the property of the former. As Lord Buckmaster said in *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619:

> Now no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

[191] And in *Mayban Trustees Berhad v CIMB Bank Bhd and other appeals* [2012] 2 MLJ 187 the Court of Appeal lifted the corporate veil on the particular facts of that case. It was held, inter alia, that:

> … It could not be any clearer. The directing minds of Pesaka and the Amdac Group (these were the companies in respect of which the doctrine of lifting the corporate veil was sought) were Rafie and Murnina who had absolute control of those companies at all material times. Rafie and Murnina were the principals behind Pesaka and the Amdac Group. Rafie, Murnina and the Amdac Group were indistinguishable as separate economic units. All notional separateness could be disregarded (*Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 533; [1997] 1 CLJ 529).

[192] While there are a plethora of other cases, it is evident from the foregoing that the veil of incorporation is generally lifted in circumstances where the elements of control and impropriety are established. Alternatively the courts have been inclined to allow the lifting of the veil where the economic sanctity or unity of the companies is so apparent that notional separateness can be disregarded.

[193] In the English case of *Faiza Ben Hashem v Abdulhadi Ali Shayif* [2008] EWHC 2380 (Fam) Munby J in the High Court of England examined very usefully the various categories of cases in which the doctrine could be invoked, warranting the lifting of the veil at paras 150–171 of the judgment of the court. As a clear exposition of the law pertaining to the lifting of the corporate veil together with a consideration of the cases where it was allowed and the rationale behind the same, I can do no better than to reproduce the salient passages, which I found to be of considerable use in determining the case before me:

> It is common ground that there are circumstances where, despite the principle in *Salomon*'s case, the court can, as it is said, pierce or lift the veil of incorporation — in this context the expressions are synonymous. What those circumstances are, and whether they can be shown to exist in the present case, have been the subject of great controversy before me.
>
> (151)The starting point is the statement of principle by Lord Keith of Kinkel in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90 at p 96:

A

it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere fagade concealing the true facts.

That statement was treated by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 at p 539 as stating a 'well-recognised exception' to the rule prohibiting the piercing of the corporate veil. It is, in my judgment, binding upon me and definitive.

B

(152)There is no particular magic in the word facade, which is here plainly being used in its secondary (and surprisingly recent) sense of 'an outward appearance or front, especially a deceptive one'. Down the years a variety of other epithets and metaphors have been used to express the same concept.

C

(153)In *Gilford Motor Company Limited v Home* [1933] 1 Ch 935 Lord Hanworth MR referred (at p 956) to the company as having been 'formed as a device, a stratagem, in order to mask the effective carrying on of the business of Mr EB Home'. He went on to describe the company as 'a mere cloak or a sham', adopting (pp 956 and 961), as did both Lawrence LJ (p 965) and Romer LJ (p 969), the phrase used by Lindley LJ in *Smith v Hancock* [1894] 2 Ch 377 at p 385. Lawrence LJ, picking up a phrase which had been used by Farwell J at first instance (see at p 955) also referred to the company (p 965) as 'a mere channel used by the defendant Home'.

D

E

(154)In *re Bugle Press Limited* [1961] Ch 270 Harman LJ described the company (at p 288) as 'nothing but a little hut built around' the shareholders and their scheme a 'hollow sham'.

F

(155)In *Jones v Lipman* [1962] 1 WLR 832, Russell J (who was later, as Lord Russell of Killowen, to agree with Lord Keith of Kinkel in *Woolfson*) referred (at p 836) to the company as 'the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'.

G

(156)And in *Wallersteiner v Moir* [1974] 1 WLR 991 Lord Denning MR described the companies (at p 1013) as being 'just the puppets of Dr Wallersteiner' which 'danced to his bidding' as 'he pulled the strings' and were according his 'creatures' (in this Lord Denning was on his own, for both Buckley and Scarman LJJ differed from him on the facts.)

H

(157)As to all that I would only add that I share the doubts expressed by Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at pp 306–308 as to whether 'sham' in this context is being used in the strict sense of the word as defined by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at p 802. Indeed, I have some difficulty with the very suggestion that a company, so long as it remains on the register of companies, could ever properly be described as a sham in the *Snook* sense.

I

(158)I have been taken to a number of cases on the topic. In addition to those I have just mentioned I must also refer to *Nicholas v Nicholas* [1984] FLR

285, *Green v Green* [1993] 1 FLR 326, *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, *Wicks v Wicks* [1999] Fam 65, *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, *Mubarak v Mubarak* [2001] 1 FLR 673, *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 and *Dadourian Groupinternational Inc v Simms* [2006] EWHC 2973 (Ch). I do not need to go through them all in turn, but the following principles can, in my judgment, properly be drawn from them.

(159) *In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle inSalomon v A Salomon & Co Ltd* [1897] AC 22, *but clear statements to this effect are to be found in Mubarak at p 682 per Bodey J and Dadourianat para [679] per Warren J. Control may be a necessary but it is not a sufficient condition* (see below). As Bodey J said in *Mubarak* at p 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this division): 'it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control'.

(160) *Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice*. In common with both Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at p 305 and Sir Andrew Morritt VC in *Trustor* at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in *In re a Company* [1985] BCLC 333 at pp 337–338, have not survived what the Court of Appeal said in *Cape* at p 536:

> (Counsel for Adams) described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As (counsel for Cape) submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

(161) *Thirdly, the corporate veil can be pierced only if there is some 'impropriety': see Cape at p 544 and, more particularly, ord at p 457 where Hobhouse LJ said:*

> *it is clear … that there must be some impropriety before the corporate veil can be pierced.*

(162) *Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be*

linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt VC said in *Trustor* at para [22]:

> Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22. But it would make undue inroads into the principle of *Salomon*'s case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.

(163)Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or facade to conceal their wrongdoing. As the vice chancellor said in *Trustor* at para [23]:

> *the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).*

And in this connection, as the Court of Appeal pointed out in *Cape* at p 542, the motive of the wrongdoer may be highly relevant.

(164)*Finally, and flowing from all this, a company can be a facade even though it was not originally incorporated with any deceptive intent The Question is whether it is being used as a facade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.*

(165)In *Trustor*, the defendant's plea (see para [16]) that Introcom had been formed in connection with an earlier scheme, having no connection with Trustor, and that it was a genuine company having its own separate existence, cut no ice with the vice chancellor, who nonetheless held that the corporate veil could be pierced. And as Warren J said in *Dadourian* at paras [682]–[683]:

> [682]In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction. It must surely be doubtful at least that the ex-employee in *Gilford Motor Co v Home* would have been liable for the company's electricity bill simply because he was using the company as device and sham to avoid a covenant binding on him personally; and the same goes for the vendor of the property in *Jones v Lipman*.
>
> [683]It is not permissible to lift the veil simply because a company has

> been involved in wrong-doing, in particular simply because it is in breach of contract. And whilst it is clear that the veil can be lifted where the company is a sham or facade or, to use different language, where it is a mask to conceal the true facts, it is, in my judgement, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done.

[194] I would respectfully adopt the foregoing summarisation as setting out neatly the requirements to be satisfied in determining whether the veil of incorporation ought to be lifted.

The present factual matrix — do the circumstances warrant the lifting of the corporate veil of Prestige Scale Sdn Bhd?

[195] Applying the foregoing to the present factual matrix it is evident from a perusal of the evidence that:

(a) Intrared does control Prestige Scale Sdn Bhd as may be seen from a perusal of the evidence of DW1, the general manager of Intrared and DW2, Ms Ng Siok Bee of Prestige Scale Sdn Bhd. However this in itself is insufficient to warrant the lifting of the corporate veil based on the principles in *Salomon v Salomon*;

(b) the 'interests of justice' is also an insufficient ground to warrant the lifting of the corporate veil. As stated in the Court of Appeal case of Alcatel-Lucent relying on the passage in Gower, the phrase is inherently vague and does not provide the court with a clear guideline as to when the normal company law rules should be displaced;

(c) the corporate veil ought to be pierced only if there is some impropriety. In the instant case it cannot be said that Prestige Scale in itself has committed any impropriety;

(d) the corporate veil ought not to be pierced simply because the company is involved in some impropriety. It cannot be said in the instant case that Prestige Scale per se was involved in impropriety. The impropriety involved in this case related to the conspiracy to injure or the breach of the share sale and purchase agreement. Prestige Scale cannot be said to have been involved in either, save and only by the lifting of the veil. Without doing so, it is removed from these wrongful or unlawful acts. Even if I am wrong in so concluding and it can be said that it was so involved, it cannot be shown that the impropriety, namely the breach of contract or conspiracy to injure was linked to the use of Prestige Scale Sdn Bhd's use of the company structure to avoid or conceal liability;

(e) if this court is to pierce the veil of incorporation of Prestige Scale Sdn Bhd it is necessary that the plaintiffs establish both control of Prestige Scale by

Intrared as well as impropriety, namely the misuse by Intrared of Prestige Scale Sdn Bhd as a device or facade to conceal their wrongdoing. In other words if Prestige Scale was used as a device or facade to conceal the true facts so as to avoid or conceal the liability of Intrared in relation to its wrongdoing, then that might be a suitable case to warrant the invoking of this doctrine. However on the facts of this case it is apparent that Prestige Scale was in fact incorporated initially by the plaintiffs and then taken over by Intrared as its 'vehicle' to purchase the building. Again while the element of control subsists the requirement that Prestige Scale was used as a facade to disguise or conceal the impropriety of Intrared is not met. For this reason I am not convinced that the veil of incorporation ought to be lifted; and

(f) in arriving at this conclusion I have given consideration to the fact that the plaintiffs may well contend that their recourse in terms of a remedy in damages may only be enforceable against Prestige Scale Sdn Bhd. However it appears to me that this is more an issue of post judgment execution whereby injunctive relief or a tracing remedy might be more appropriate remedies rather than seeking to establish primary liability against Prestige Scale Sdn Bhd when the facts disclose that this entity had little, if any, part to play in the bringing about of the breach of contract and conspiracy to injure. Those acts were the brainchild of KFH and Intrared.

[196] For these reasons I am unable to conclude that the veil of incorporation of Prestige Scale Sdn Bhd ought to be lifted. The net result of my finding is that Prestige Scale is not therefore liable to the plaintiffs per se, for the breach of contract and unlawful means conspiracy which has been established against Intrared.

What quantum of damages, if any, are recoverable by the plaintiffs from Intrared for breach of contract and conspiracy to injure?

The plaintiffs' claim for damages

[197] In their statement of claim, the plaintiffs seek from the defendants jointly or severally the monies set out in paras (a)–(g) of para 47. It is to be noted that pursuant to my finding above in relation to the attempt to lift the corporate veil which I have rejected, any or all damages are payable by Intrared only.

[198] In para 47 of the statement of claim the plaintiffs claim special damages of RM225,000,00; general damages of RM100,000,000; aggravated damages of RM100,000,000, exemplary damages of RM100,000,000,

damages to be assessed and interest as well as costs on a solicitor client basis.

The law relating to damages

[199] The law pertaining to each of these heads of damages has been comprehensively set out by learned counsel for the second defendant, Ms Liza Chan and Mr Chew Chang Min, which I propose to adopt almost in its entirety. The position in law is not in dispute between the parties, judging by their respective submissions. Before doing so however it is relevant to reiterate that in order to succeed in their claim for damages, the plaintiffs should be able to show causation or a causal connection or factual link between the breach and the losses they have suffered.

Causation

[200] *Chitty on Contracts* (29th Ed), at para 26–029 provides, inter alia, that:

> Requirement of a causal connection. The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must first be proved; there must be a causal connection between the It for a loss only where the breach of contract was the 'effective' or 'dominant' cause of that loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. The answer to whether the breach was the cause of the loss or merely the occasion for the loss must 'in the end' depend on 'the court's common sense' in interpreting the facts …

(see also *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] SGCA 8 TAB 23; and *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360).

[201] It follows from the foregoing that it is incumbent upon the plaintiffs to establish that the damages claimed arose as a consequence of, or that such losses were directly caused by the breach of contract or conspiracy to injure.

[202] Also relevant is the case of *Fish & Co Restaurants Pte Ltd v Revenue Valley Sdn Bhd & Ors* [2010] 1 LNS 432 where the issue of causation was considered. The relevant portion of the judgment states:

> 25. When determining whether or not to award any damages, it must be borne in mind that the object of compensation here is to put the plaintiff in the position it would have been in if the undertakings had been honoured. While there may be other factors at play which caused the plaintiff to lose money in its various outlets (save for that of 1Utama) this does not disentitle or deprive the plaintiff of its claim. What is critical is the causal link between the defendants' act or omission and the

loss claimed. The breach need not be the only cause of the loss or damage to the plaintiff. In *Chitty on Contracts* (26th Ed), para 1788:

> An intervening event which could reasonably be expected will not excuse the defendant for the loss caused by the combined operation of the defendant's breach and the intervening event. If a breach of contract is one of two causes, both operating and both of equal efficacy in causing loss to the plaintiff, the party responsible for the breach is liable to the plaintiff for that loss.
>
> …

How are damages assessed?

Breach of contract

[203] Section 74 of the Contracts Act 1950 provides that the party who suffers by the breach is entitled to receive from the party that has breached the contract, compensation for any loss or damage caused thereby which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract to be likely to result from the breach of it. The section further provide that no compensation is available for any remote or indirect loss or damage so sustained.

[204] In *Hadley v Baxendale* (1854) 156 ER 145 the court held:

> Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of breach of contract *should be such as may fairly and reasonably be considered as either arising naturally*, ie according to the usual course of things, from such breach of contract itself, or *such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract* as the probable result of the breach of it. (Emphasis added.)

[205] It follows from the foregoing that two categories of damages are contemplated here, namely damages which would arise naturally in the ordinary course of events, and secondly damages which ought to be in the contemplation of both parties at the time when they made the contract as being the possible measure of damages if the contract were in fact breached. In determining or assessing damages payable, the issue of remoteness is to be borne in mind to ensure that any damages awarded are not too remote. The concept of 'remoteness' was explained in the Singapore Court of Appeal case of *Roberson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another*:

> … Damage which fell under the first limb of *Hadley* (ie ordinary damage) ought to be well within the reasonable contemplation of all the contracting parties concerned. Since everyone (including the contracting parties) must, as reasonable people, be taken to know of damage which flowed 'naturally' from a breach of

contract the first limb of *Hadley* did no violence to the original bargain between the contracting parties. If the contracting parties had thought about this issue they would in all likelihood have agree that the contract-breaker should be liable in damages for all such 'ordinary' damage. It was therefore neither unjust nor unfair to impute knowledge of such damage to them. Damage which fell under the second limb of *Hadley* ('ie extraordinary' or non-natural damage) was not, by its very nature within the natural contemplation of the contracting parties. It would be both unjust and unfair to impute to them knowledge that such damage or loss would arise upon a breach of contract. However, if, armed with such actual knowledge, the contracting parties did not make express provision in their contract for what was to happen in the event of a breach of that contract resulting in 'extraordinary' or 'non-natural' damage, then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage.

[206] Knowledge under the second limb of *Hadley v Baxendale* must be actual knowledge:

… knowledge 'possessed' is of two kinds: one imputed, the other actual …

…

But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach of those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable (*Victorial Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

[207] This then sets out the position in relation damages claimed as a consequence of the breach of contract by Intrared. It follows from the foregoing that the plaintiffs are entitled, in so far as the breach of contract is concerned, to recover loss and damage which was either 'foreseeable' under the first limb or 'within the knowledge' of the defendants.

Foreseeable loss

[208] As a matter of fact the plaintiffs through Deepak, PW1, had testified that by reason of the breach of contract on the part of Intrared, and by virtue of the conspiracy between Intrared and KFH which resulted in both parties failing to honour their contractual obligations under the share sale and purchase agreement and irrevocable letter of undertaking, the sum of RM17,999,867.70 was not paid to Bank Rakyat when it was due.

[209] This fact is not in dispute. In effect these omissions on the parts of Intrared and KFH resulted in the plaintiffs defaulting on payments to Bank Rakyat for the repayment of the term loan. As a consequence Bank Rakyat

charged interest (or 'profit' in Islamic financing terms) and late penalty charges for the late payment for the period from January 2011 until July 2011.

[210] The plaintiffs submit that they suffered losses in terms of incurring additional interest (which it terms as 'profit' under the Islamic financing facility) and also late penalty charges by Bank Rakyat on the outstanding sum of RM5,999,955.90 for the period from January to June 2011 and for the outstanding sum of RM11,999,911.80 for the period from April 2011 until June 2011 which amounts to approximately RM1,011,497.41.

[211] It appears to this court that it is a readily foreseeable consequence of Intrared's decision to cease or halt payments under the share sale and purchase agreement and consequently for KFH not to honour its irrevocable letter of undertaking that late charges and additional 'interest' charges would accrue. It is a direct and undeniable consequence of failing to pay a banker as and when monies are due, that late interest inevitably accrues to the arrears already due.

[212] PW1 testified as to the fact that Intrared's failure to pay monies due to Bank Rakyat in the sum of RM17,999,867.70 resulted in the triggering of a default on the plaintiffs' repayment obligations in respect of its term loan with that bank. In support of the contention that additional interest and late interest charges accrued, the plaintiffs called one Mohd Zahry Mohd Yusof ('PW8') an officer from Bank Rakyat to testify to the same. This witness produced an email dated 14 November 2010 which he had written on behalf of Bank Rakyat and in which Bank Rakyat claimed the sum of RM1,011,47.41.

[213] The e-mail dated 14 November 2011 stipulates that its subject matter is 'term financing of RM40m'. It is addressed to Deepak and sets out in tabular form the profit and late payment charges stated to be 'charged' to Deepak for the period from January 2011 to July 2011, which he summarises at the end to amount to RM1,011,497.41. In the course of his evidence PW8 confirmed that this amount was indeed claimed by Bank Rakyat of the plaintiffs by reason of their late payment. The plaintiffs therefore make claim for this sum of RM1,011,497.41 as arising as a natural consequence in the ordinary course of matters from Intrared's breach of contract.

[214] The defendants however dispute this claim strongly contending, inter alia, that Bank Rakyat's interest claim comprises nothing more than a summary of particulars without any supporting documents to prove its contents. They point to the fact that it is merely an email and not even a statement from Bank Rakyat.

[215] They further contend that the plaintiffs have failed to lead evidence to show how this e-mail is connected to or factually linked to or related to the

failure of Intrared and/or KFH to pay Bank Rakyat the sum of RM17,999,867.70, the breach of the share sale and purchase agreement and the irrevocable letter of undertaking. In short they contend that causation has not been established, namely that the breach, namely the failure to pay the plaintiffs or Bank Rakyat the monies due under the agreement and the letter of undertaking resulted in the sum of RM1,011,497.41 being payable by the plaintiffs to Bank Rakyat as late payment charges and 'interest'.

[216] I have considered the respective propositions in law and conclude that the plaintiffs have in fact succeeded in establishing that they suffered the levying of interest at the rates specified by Bank Rakyat in its e-mail of 14 November 2011 resulting in a penalty payment of RM1,011,497.41. The levying of such an interest is a natural and readily foreseeable consequence of the failure to pay loan instalments due under the facility at the requisite time. There was no other reason for Bank Rakyat to levy such interest payments other than delay. In view of the fact that it is not disputed that payments were in fact halted for the stipulated period and only recommenced subsequently after a delay of several months, the irresistible inference to be drawn is that the sum of RM1,011,497.41 was levied by Bank Rakyat as a consequence of late payment. In other words the causation for the levy of the said sum was the breach of contract on the part of Intrared. Causation to my mind is clearly established.

[217] I further conclude that the e-mail of 14 November 2011 is sufficient and adequate evidence of the loss and damage suffered by the plaintiffs as a consequence of the breach of contract perpetrated by Intrared. PW8 testified to this effect. He was a witness who was an employee of Bank Rakyat called specifically to establish the quantum of interest levied on the plaintiffs as a consequence of the suspension of payments. I accept his evidence which supports the plaintiffs' claim for RM1,011,497.41. The plaintiffs are therefore entitled to damages in this sum from Intrared by reason of the breach of contract.

Damages for conspiracy to injure

The position in law

[218] I have concluded previously that the plaintiffs have succeeded in establishing that Intrared conspired with KFH to injure them, more particularly Deepak. What then is the position in law in relation to the assessment of damages under this tort?

[219] *McGregor's on Damages* (16th Ed), at para 1935 sets out the general position comprehensively:

A … The tort of conspiracy has a very wide theoretical range, but in practice it has been used by litigants to gain redress for interferences with their contractual relations: not uncommonly, claims in respect of both torts are brought together …

The damages follow much the same pattern as that in inducement of breach of contract. Thus, while a showing of pecuniary loss is necessary to ground the action B for conspiracy, the damages are at large, so that once some pecuniary loss is shown the damages are not limited to the precise calculation of pecuniary loss actually proved. Dillon LJ put the matter thus in *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489 and the same is reflected in the frequently cited trial judge's notes of the evidence in *Quinn v Leathern* [1901] AC 495 which run thus:

C

> I told the jury that pecuniary loss, directly caused by the conduct of the defendants must be proved in order to establish a cause of action, and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the D wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved.

Nonetheless the Court of Appeal in *Lonrho*, critical of the initial pleading of the plaintiffs there, was clear that it was not sufficient merely to plead in reliance upon the damages being at large, the broad conventional allegation that by reason of the E stated facts damage has been suffered for this does not prove actual pecuniary loss.

As with inducement of breach of contract the main loss is likely to be based upon loss of profits; it was accepted in *Lonrho v Fayed (No 5)* that if the plaintiffs could show loss of profits they could recover for that loss. So too the expenses which Roxburgh J considered as recoverable damage in *British Motor Trade Association v* F *Salvadori* [1949] Ch 566 he so considered both in the count for inducement of breach of contract and in the count for conspiracy; …

[220] It follows from the foregoing that pecuniary losses arising from or as a G consequence of the conspiracy are claimable.

[221] McGregor goes on to consider whether claims for non pecuniary loss to feelings etc may be awarded for conspiracy to injure as was signified in *Quinn v Leathern*. However in *Lonrho* the House of Lords concluded that damages for H injury to feelings could not be granted for conspiracy on the basis that defamation was the appropriate route for the plaintiff. This rationale has been criticised by several writers but remains the position in law.

[222] Similarly in a treatise on damages entitled *Measuring Damages in the* I *Law of Obligations* (2010, Hart Publishing), the author, Sirko Harder reiterates the point that recovery for loss of reputation has been denied in conspiracy (see *Lonrho v Fayed No 5* [1993] 1 WLR 1489 (CA). He points out however that it is established that torts other than defamation allow recovery for financial loss consequent on an injury to reputation (*Lonrho v Fayed*). In *Spring v Guardian*

Assurance plc [1995] 2 AC 296 the House of Lords (Lord Keith dissenting) held that employers who carelessly give a defamatory reference for a former employee can be liable in negligence and contract for the employee's financial loss.

[223] It follows from the foregoing that financial or pecuniary loss consequent on an injury to reputation is also claimable in tort.

The plaintiffs' claim

[224] The plaintiffs make claim for losses arising from:

(a) the alleged loss of certain rice contracts vide an entity known as Reliance Pillar Sdn Bhd; and

(b) alleged losses arising from a land transaction involving an entity known as Astacanggih Sdn Bhd.

[225] Prior to considering the foregoing, it must be said that although the plaintiffs did not raise it, a direct, foreseeable loss arising from the conspiracy to injure the plaintiffs' economic interest is the quantum of interest levied by Bank Rakyat in view of the wrongful suspension of interest payments for several months amounting to RM1,011,497.41. It follows that as a consequence of the conspiracy to injure which took the form of a concerted decision to deliberately not make payments due to Bank Rakyat under several contractual documents, the plaintiffs suffered pecuniary or financial loss amounting to the stated sum. The evidence of PW8 and the e-mail of 14 November 2010 all bear this out too, as has been discussed at length earlier. However the plaintiffs are necessarily not entitled to make claim twice for the said amount.

[226] However the fact that such damage flows directly and consequently from the wrongful and deliberate acts of Intrared and KFH acting in concert, is significant because it goes towards establishing the cause of action founded in the tort of conspiracy to injure. Therefore even if the plaintiffs do not succeed in proving any further loss, this loss suffices to establish the cause of action in conspiracy.

Losses arising from the rice contracts

[227] With respect to the rice contracts and Reliance Pillar Sdn Bhd, PW1, Deepak testified that Reliance Pillar Sdn Bhd was an entity in which Ezul, the second plaintiff was shareholder. The second plaintiff, Ezul was at all material times a director and shareholder of Rice Pillar Sdn Bhd. The first plaintiff,

Deepak was a consultant in Reliance Pillar Sdn Bhd and he testified that he received fees and profits from such position.

[228] In any event in the course of the second plaintiff's evidence, it became evident that he was at all material times acting for and on behalf of Deepak. He testified inter alia that all matters pertaining to losses suffered by Reliance Pillar Sdn Bhd would have to be referred to Deepak who handles all the operations. Put another way it appeared that he was a nominee for Deepak. All profits earned from the entirety of the plaintiffs' business venture were channelled to the first plaintiff who determined the profits or benefits available to the second plaintiff.

[229] Deepak further testified that Reliance Pillar Sdn Bhd had contracts with the Government of Malaysia and Padiberas Nasional Bhd. It had a contract for the supply of rice of a value of USD450 per tonne with an order for 50,000 tons per month with a total value of USD22.5m per month. According to Deepak, Reliance Pillar would purchase rice from overseas suppliers and on-sell to the Government of Malaysia. The cost price for Reliance Pillar was USD340–350 per tonne, as a consequence of which its profit was estimated at USD110 per tonne multiplied by 50,000 tonnes at a USD exchange rate of RM3.5 which was computed to approximately RM19m per month.

[230] In support of the foregoing oral evidence relating to the supply of rice to the Government of Malaysia, the plaintiffs produced evidence of the contract to purchase rice between the Government of Malaysia and Reliance Pillar and Padiberas Nasional dated 27 October 2009. Additionally the plaintiffs produced a further contract to purchase rice dated 27 May 2010 effective for a period of eight months and 23 days between the same parties, namely the Government of Malaysia, Reliance Pillar Sdn Bhd and Padiberas Nasional Bhd.

[231] Deepak next testified that as a consequence of his name appearing on the defaulter's list (as a consequence of failing to make the requisite repayments to Bank Rakyat) the supplier of the rice, one Vaswani (S) Pte Ltd refused to extend the plaintiffs' credit facility which they had been utilising for some eight months previously for the purchase of the rice. Several e-mails to this effect were produced and exhibited in court. As a consequence Reliance Pillar Sdn Bhd could not and did not purchase rice for the purposes of on selling to the Government of Malaysia. Deepak claimed that Reliance Pillar therefore lost profits due to it under the exhibited contracts.

[232] Deepak further testified that KFH was aware of the existence of these contracts as borne out by e-mails dated 26 January 2010 and 22 February

2010. This was further corroborated by PW3, as he confirmed that Reliance Pillar Sdn Bhd enjoyed a major facility with KFH.

[233] Based on the foregoing the plaintiffs have computed a table of estimated profits lost by the first and second plaintiffs respectively. With respect to Deepak the computation is based on his share of profit as per a consultancy agreement fixed at 60% amounting to RM125,136,000. While for the second plaintiff a claim of 40% of the share of profit amounting RM83,424,000 is made.

[234] The plaintiffs did produce the consultancy agreement evidencing Deepak's role in Reliance Pillar Sdn Bhd, albeit somewhat belatedly in the course of re-examination. The admission of this document in evidence was strongly objected to by the defendants on the grounds that it had not been stamped. The defendants sought to have sight of the original which was subsequently not produced. Given that Deepak testified as to the authenticity of the document, and given the existence of the several emails from Vasvani Brothers which showed that it was Deepak who in fact liaised and carried out operations with regards to this contract, I accept the same in evidence. But the contract in itself merely establishes that Deepak was entitled to a percentage of profits enjoyed by Rice Pillar Sdn Bhd. In order to succeed in a claim for damages under this head however, it is necessary for the plaintiffs to establish that Rice Pillar Sdn Bhd did in fact enjoy profits initially and subsequently lost such profits as a consequence of its consultant being placed on the defaulter's list. This however was not clearly proved or established by the plaintiffs.

[235] The plaintiffs did not produce any evidence such as prior statements of account or documentary evidence which proved that they had previously enjoyed the profits of the contracts referred to above. No management or audited accounts of the company were produced. It was not possible for the court to have sight of and examine any financial documents or evidence disclosing or proving the receipt of profits to this extent, albeit by Reliance Pillar Sdn Bhd as a consequence of these particular rice contracts. There was simply insufficient evidence to enable the court to make a proper assessment of damages under this head. A tabular computation of an estimated loss of profits is not proof of actual financial loss suffered and is wholly inadequate to prove the plaintiffs' alleged losses. There was no primary evidence to substantiate the computation (see *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229).

[236] Further and finally it would appear that the losses claimed appear to have been suffered by Reliance Pillar Sdn Bhd and there are no documents apart from Deepak's oral averments to link him or the nature of his precise relationship to this company. Although the plaintiffs seek a loss of profits and

do not seek to make claim on behalf of Reliance Pillar Sdn Bhd, there are insufficient documents before the court for the court to establish the individual plaintiffs entitlement to shares of profits under the contract between Rice Pillar Sdn Bhd, Padiberas and the Government of Malaysia. In the absence of such documents the court is unable to assess the loss of profits accurately or at all (see also *Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1).

[237] For these reasons I am unable to allow the plaintiffs' claim for damages arising from this head.

The Astacanggih transaction

[238] The plaintiffs also claim losses allegedly suffered as a consequence of estimated profits lost in respect of the sale of a parcel of land. Astacanggih Sdn Bhd is described by Deepak as one of his other companies. KFH was at all material times Astacanggih's financier. Deepak testified that Astacanggih purchased a parcel of land in Bukit Raja Klang from Awan Megah (M) Sdn Bhd for the sum of RM118m. It then entered into a sale and purchase agreement with one Estet Perkasa, a special purpose vehicle of Hap Seng Land Sdn Bhd to onsell the same parcel of land at the higher price of RM180m. The proposed profit would therefore be RM62m. The two agreements were produced in the course of evidence. Deepak Jaikishen executed the same as a director of Astacanggih Sdn Bhd.

[239] Deepak further testified that Hap Seng Land paid the deposit of approximately RM3.6m on 28 December 2010. A receipt from Astacanggih's solicitors evidencing the placement of this sum by way of deposit with them has been produced and exhibited.

[240] On 15 December 2010 Astacanggih wrote to KFH to seek an extension of the facility to enable it to complete the acquisition from Awan Megah (M) Sdn Bhd. However KFH did not renew that banking facility as a consequence of which, according to Deepak, he was unable to complete the purchase. Astacanggih then applied to CIMB for alternative financing but was in advised in March 2011 that it could not assist because Deepak was on Bank Negara's defaulter's list. As a consequence Astacanggih could not proceed with the sale with Hap Seng whereupon the agreement with the latter was terminated. Therefore Deepak makes claim for the sum of RM62m being the loss estimated to be suffered by Astacanggih.

[241] The plaintiffs then produced a tabular computation once again simply stating that Deepak's equity holding in Astacanggih Sdn Bhd was 20% and that the second plaintiff's indirect equity interest in Astacanggih through other

entities amounted to 50.49%. There was however no documentary or other evidence produced to explain or substantiate this crucial issue. As matters stand even if it is more probable than not that Astacanggih did indeed lose out on this deal, there is insufficient evidence of Deepak and the second defendant's interest in Astacanggih Sdn Bhd for this court to accept or grant an award in damages to them.

[242] As pointed out by the defendants, the loss or damage if at all, is that of Astacanggih. In the absence of evidence proving or showing precisely how each of the plaintiffs enjoys such an equity share in Astacanggih, it is difficult to ascertain the loss they allege to have suffered. As matters stand the court may be able to infer losses suffered by Astacanggih but not by the plaintiffs in this action.

[243] The issue of causation also poses some difficulty. It may be argued that the failure of the transaction was caused by the decision of KFH not to proceed to extend the facility granted to Astacanggih, rather than being entirely due to the failure to procure the alternative financing from CIMB as a consequence of Deepak being placed on the defaulter's list. It is also possible that both factors contributed to the ultimate failure of the transaction. As such it is not absolutely clear that the failure was entirely due to Deepak being placed on the defaulter's list as a consequence of the conspiracy to injure the plaintiffs' interests by KFH and Intrared.

[244] Further there was no evidence from CIMB to show that Astacanggih had in fact applied and been rejected by reason of Deepak being on the defaulter's list. There is no evidence from this bank as to precisely what took place in March 2011 which gave rise to the termination of the agreement between Astacanggih and Estet Perkasa.

Given the foregoing this head of claim for damages also fails.

General damages

[245] It appears to this court that the direct and foreseeable result of the conspiracy to injure was to cause:

(a) a default in the Bank Rakyat facility;

(b) such default would in turn cause Deepak and/or the second plaintiff to be placed on the defaulter's list;

(c) this necessarily would result in the plaintiffs being injured in respect of their credit rating which can be considered a business asset; and

(d) as a consequence of the injury to their credit reputation, the plaintiffs suffered losses in major financial transactions.

A **[246]** While the plaintiffs have not been able to establish with certainty the exact loss suffered, the preponderance of evidence before the court discloses with clarity that the plaintiffs, particularly Deepak, suffered a steep decline in the operation of his conglomerate of companies which are involved in a diverse array of business operations, ranging from rice and real property to a variety of other matters.

[247] Accordingly it appears to this court, that given the finding of conspiracy to injure the economic interests of the plaintiffs, which resulted indeed in considerable injury to their economic interests, the plaintiffs are entitled to be compensated for the harm done to them. This is an economic tort and the loss which the plaintiff suffered, namely economic loss meant in real terms that the plaintiffs lost a real asset, namely a business asset, ie their credit rating which enabled them, particularly Deepak, to carry on with the financing of his business empire. If the plaintiffs' goods had been damaged the basic pecuniary loss would have been the diminution in their value which is measured by the cost of repair. Alternatively if the goods had been destroyed or misappropriated, the plaintiffs would have been entitled, theoretically to the market value of the goods so destroyed or misappropriated.

[248] By analogy, in the instant case by reason of the conspiracy to injure on the part of Intrared and KFH, the plaintiffs lost their credit rating which is a business asset. They are therefore entitled to be compensated for such loss, as it appears clear to this court that such loss has indeed been established on the evidence here at trial. It remains to be considered what quantum of monies would have the effect of compensating the plaintiffs for the loss they unwittingly suffered as a result of the deliberate decision taken by a banking institution and one of its subsidiaries, acting conjointly to cease making payments due to a third party on behalf of the plaintiffs, notwithstanding express contractual obligations to do so. This case is particularly unique because it involves a deliberate act on the part of a banking institution to effectively induce a breach of contract on the part of its customer who also enjoys a facility with another financial institution. In other words the implications of their joint action could not have escaped them.

[249] Although I have refused to grant relief in respect of the actual loss and damages stated to be incurred by Reliance Pillar Sdn Bhd and Astacanggih Sdn Bhd, the evidence pertaining to the same is relevant in so far as it evidences the fact that the plaintiffs, particularly Deepak did suffer economically as a consequence of the conspiracy. It is the quantative aspects of the evidence which was lacking. This is not a case where the court, finding that actual loss and damage is not proved with particular precision, simply folds its hands and refuses to compensate the plaintiffs for losses that have clearly been suffered by them.

[250] In this respect the Court of Appeal case of *Bumiputra-Commerce Bank Bhd v Top-A Plastic Sdn Bhd* [2008] 5 MLJ 34; [2008] 5 CLJ 737 is instructive. The plaintiff's claims there were stated to be founded on breach of contract in freezing the account and dishonouring cheques presented for payment over a period of time as well as another claim premised on defamation by the printing of the words 'Frozen Account' on the cheques.

[251] Having found all this to be 'highly libellous' and likening the bank's conduct to signifying that the plaintiff had gone into liquidation, significant damages, including aggravated damages, were awarded. In like manner in the instant case, the plaintiffs here being placed on a banking blacklist most certainly injured the plaintiffs' credit in a financial sense as submitted by learned counsel for the plaintiffs. In the course of its judgment the Court of Appeal considered the approach applied by Zakara Yatim J in Heliliah JCA stated as follows:

> … However on the issue of the quantum of damages the decision of the learned trial judge cannot be upheld as it is found that there has been occasioned a misdirection of the law. It is true that guidance has been sought by the learned trial judge from the decisions in *Ng Cheng Kiat v Overseas Union Bank* [1984] 2 MLJ 140; [1984] 1 CLJ 185 and *Great One Produces Industries (M) Sdn Bhd v Malayan Banking Bhd* [1985] 2 MLJ 469; [1985] 2 CLJ 390. Both decisions reflect the view that in the case of a trader it was not necessary for the plaintiff to show actual damages in order to recover substantial damages. In the former case Wan Hamzah J said (at p 288):
>
> > Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the amount of damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving actual damages.
>
> This is in line with the statements in the House of Lords in the case of *Wilson v United Countries Bank Ltd* [1920] AC 102. In this case the jury had awarded 7,500 pounds sterling for injury to the plaintiff's personal reputation. Lord Birkenhead LC said:
>
> > The objection was taken by the defendants that this finding of the jury cannot be supported without proof of special damages … On principle the case seems to me to belong to that very special class of cases in which a banker though his customer's account is in fund, nevertheless dishonour the cheque. The ratio decidedly in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damages, reasonable compensation for the injury done to his credit …

[252] In the instant case while this matter does not fall directly into the

special class so described above, it is clear that in like manner the decision of Intrared and KFH to withhold or suspend payments due on no rational or reasonable basis other than to punish the plaintiffs appears to my mind to give rise to the same reasoning. Here too, there was a deliberate refusal to comply with express contractual obligations knowing at all times that a failure to do so would cause substantial injury to the plaintiffs' credit facilities and his business empire. Therefore in like manner it is a case where without allegation of special damages the plaintiffs are entitled to reasonable compensation for injury done to their credit, particularly that of Deepak as a consequence of being placed on a defaulter's list for the purposes of credit rating. There can be no clearer evidence of injury. In this context I accept Deepak's evidence that he was refused alternative financing at financial institutions on the grounds of being placed on a defaulter's list.

[253] Given the foregoing, it appears that the plaintiffs are entitled to be compensated for the loss of their business asset, namely their credit rating which was lost when they were placed on the defaulter's list. It is also in evidence that their companies suffered financial losses as a consequence of the lack of further financing. Given this composite evidence it appears to the court that a sum of RM1,000,000 serves as reasonable compensation for the loss so suffered and the plaintiffs are therefore awarded the said sum.

[254] It is worth saying that whether the said sum is considered as damages arising from the breach of contract by Intrared, or the conspiracy to injure by Intrared in conjunction with KFH, it is due to the plaintiffs under either causes of action. As there can be no duplicity or double compensation the plaintiffs is only entitled to the sum of RM1,000,000. Put another way, even if I am wrong in concluding that the plaintiffs are entitled to the said sum under conspiracy to injure, it follows from the foregoing rationale that alternatively, the plaintiffs are entitled to the same under the cause of action founded in breach of contract, given the unique facts of this case.

Exemplary and aggravated damages

[255] I have perused and considered at some length the plaintiffs' claim for exemplary and aggravated damages as well as the defendants' opposition to such claim. It appears to this court that aggravated and exemplary damages are not proved nor warranted in these circumstances.

[256] In conclusion therefore the findings of this court are that:

(a) the plaintiffs have succeeded in establishing breach of contract against Intrared only;

(b) the damages suffered as a consequence of such breach of contract, namely RM1,011,497.41;

(c) the plaintiffs have succeeded in establishing that Intrared and KFH conspired to injure their economic interests. As the suit against KFH was discontinued, liability subsists against Intrared only;

(d) the plaintiffs are entitled to be compensated for the loss and damage they suffered as a consequence of the conspiracy which resulted in their defaulting in the repayment of a loan due to Bank Rakyat and caused them to be placed on a defaulter's credit listing or CCRIS which in turn meant that they lost their credit standing and ability to procure financing for their diverse operations. In this case the plaintiffs are therefore entitled to a sum of RM1,000,000;
Further or alternatively even if I am incorrect in concluding that there was a conspiracy to injure the plaintiffs' economic interest by Intrared, they are still entitled to the sum of RM1,000,000 as general damages for loss of their credit reputation as a consequence of the breach of contract by Intrated;

(e) the plaintiffs did not succeed in their claim against Prestige Scale Sdn Bhd in so far as the lifting of the corporate veil is concerned, on the present factual matrix; and

(f) the plaintiffs are awarded the costs of this action which are to be paid by Intrared.

Plaintiffs' claim only allowed against Intrared allowed only in part with costs.

Reported by Ashok Kumar